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JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 592

S. J. GROVES & SONS CO., INC., a Minnesota corporation, Eagle, Pennsylvania, individually and as Assignee of Wallace Woodington,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH LORENZ,
Counsel for Petitioner.

C. J. PERNICONE,
CONSTANTINE P. LAMBOS,
Of Counsel.

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THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on September 17, 1956, amending a judgment entered on August 22, 1956.

Citations to Opinion Below

The opinion of the United States Court of Appeals printed in Appendix A, *infra*, page 16, is reported at 236 F. 2d 760.

Jurisdiction

The judgment of the United States Court of Appeals was dated and entered on August 22, 1956 (1272a). Said judgment was vacated by order dated September 17, 1956 (1281a)*, and a new judgment was filed on September 17, 1956 (1283a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does an interestate common carrier by railroad violate the duty imposed on it by the Federal Employers' Liability Act to supply an employee riding in its locomotive with a safe place to work when it operates its train at such a rate of speed that the vehicle cannot be stopped within the operator's range of vision, as the locomotive approaches a grade crossing at which no advance notice of the approach of a train is given (907a-908a) and which is admittedly known to be dangerous (444a, 448a)?

2. Was it permissible for the Court of Appeals, after having conceded that the evidence of the railroad's negligence in failing to provide more adequate warning devices at the crossing was sufficient to present a jury question, to have set aside the jury's verdict against the railroad by holding as a matter of law that there was no proximate relationship between such inadequate warning devices and the railroad's operation of the locomotive at such speed as prevented stopping within the range of the operator's vision?**

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* Figures in parentheses, followed by the letter "a", refer to pages of the printed Appendix to Appellants' Briefs in the United States Court of Appeals.

** In order to reach this question, the majority improperly accepted as a fact, based on what it termed "more persuasive evidence", that the crane was stalled for some time on the crossing before the collision, when the jury's verdict implied the contrary, and the evidence on these points was in conflict.

The Statute Involved

The statute involved is the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U.S.C. § 51, *et seq.* the text of which is set forth in Appendix B, pp. 34-38, *infra.*

Statement

A. The Action:

Seriously injured in a collision between Respondent Pennsylvania Railroad's locomotive, in which he was riding, and Petitioner's heavy motor-crane (524a-526a), at a dangerous grade crossing (444a, 448a), Woodington, employed by the Railroad as an engineman, was awarded $297,500, after trial by jury in the Federal District Court for the Southern District of New York. Woodington's suit against the Railroad was brought under the Federal Employer's Liability Act, 45 U.S.C. Sec. 51, *et seq.*, and against Petitioner at common law for negligence, jurisdiction being invoked by reason of diversity of citizenship (3a-4a). Petitioner and Respondent—the judgment on the verdict running against both—appealed to the Court of Appeals for the Second Circuit (1240a-1242a). That Court affirmed as to the Petitioner and, one Judge dissenting, reversed and remanded for a new trial as to the Railroad, on the ground that a portion of the Trial Court's charge was erroneous to the Railroad's substantial prejudice (Appendix A, p. 29, *infra*). A motion for a stay of execution of the judgment having been denied by the Court of Appeals, Petitioner paid the judgment, took an assignment thereof from Woodington, which was filed in the District Court, and had said judgment marked to the use of Petitioner. Petitioner, which had cross-claimed against the Railroad (19a-27a), also has a right of contribution against it, as a joint tortfeasor, 12 Pa. Stat. (Purdon Perm. ed.) Sec. 2081; *Howey* v. *Yellow Cab Co.,* 181 F. 2d 967, affd. 340 U. S. 543; *Puller* v. *Puller,* 380 Pa. 219, 220, 110 A. 2d

175; *Frank* v. *W. S. Losier & Co., Inc.*, 361 Pa. 272, 275, 64 A. 2d 829.

B. The Grade Crossing at Which the Accident Occurred:

Longs Road is a public highway, near King of Prussia, Pennsylvania, which runs in a northerly direction from Route 23 to Route 202. Along its course, the road intersects two tracks of the Railroad, at a point which is known as Longs Road crossing (38a). A single track of the Reading Railroad runs slightly to the north of, and parallel to, the Pennsylvania tracks (460a-461a). While the opinion of the Court below denotes the location as "a sparsely settled area" (Appendix A, p. 17, *infra*), the evidence shows that to the north of the crossing are large numbers of houses and other structures (39a, 42a, 43a, 870a). Immediately to the south of the crossing is a tool factory (39a). At the time of the accident, the crossing was continuously used by trucks, cranes, automobiles, and pedestrains (112a, 153a, 203a, 303a, 465a, 796a, 1021a). During an average day between 85 and 90 trucks and passenger automobiles passed over the crossing (387a, 444a). Frequent trains moved over the crossing in each direction and in fact three different locomotives of the Railroad had used the crossing in a matter of minutes at the time of the accident (444a, 448a, 581a, 1006a).

For some time heavy construction on a highway and on a natural gas pipe line had been under way along both sides of the track. In connection with this work, trucks and heavy construction equipment worked near Longs Road and used the grade crossing (112a, 152a, 303a, 582a, 583a, 1071a).

Woodington's train was proceeding eastbound on the southerly track. Some time before the accident, the eastbound speed limit had been increased from 40 miles an hour to 50 miles an hour (446a). The westbound speed limit of 40 miles an hour remained unchanged. The visi-

bility of a locomotive operator was limited by a curve in the eastbound track so that he could not see a vehicle on the tracks until he was within 700 to 800 feet from the crossing (40a, 523a). The view of a motorist about to enter the crossing was similarly limited. Visibility was also obstructed by catenary poles and by trees, bushes and other vegetation growing along the right of way, which could have been removed by the Railroad (523a, 554a, 562a).

While the Railroad maintained watchmen, gates and flashing light signals at various neighboring grade crossings, no such protection was offered at Longs Road (908a). The only warning maintained by the Railroad at Longs Road was a "reflector type cross-buck sign", which is two pieces of wood fastened together warning of the existence of railroad tracks, which had been installed under an order of the Pennsylvania Public Utility Commission (765a, 905a, 908a).

The roadbed at the crossing was a rough one which required vehicles to proceed slowly (151a, 304a). No light or other signal was maintained over the crossing which would have indicated its presence to engineers of approaching trains (562a). A whistle post, some 1468 feet from the crossing (245a), had been moved when the speed limit on the eastbound track had been increased, and no signal of any type indicated a reduction in speed to locomotive engineers approaching the crossing (551a). On its track, slightly to the north, the Reading Railroad had established a speed of 25 miles an hour for its trains which passed over Longs Road (676a).

Because of the above facts, a representative of the Railroad was clearly justified in testifying at a Public Utility Commission hearing before the accident that:

> ". . . a hazard exists at every grade crossing, and at this crossing particularly by reason of the high speed of the trains." (444a)

C. The Accident:

As the train was approaching Longs Road, with Woodington's fireman operating the locomotive, at a speed of about 50 miles per hour (562a-568a, 1047a), Petitioner's motor-crane, moving north, was also approaching the intersection (111a). One of Petitioner's employees drove his car, which was preceding the motor-crane, over the tracks and stopped on the other side of the crossing. The operator of the motor-crane stopped his vehicle some 40 feet from the first rail, waited until he was directed to come forward by the other employee who acted as a look-out, and moved on to the track (112a). There was conflicting testimony as to whether at the time of the collision the crane was stalled motionless on the track or whether it was still in motion. The crane operator said it had stalled (113a); Woodington and the fireman on another engine which had just passed the crossing testified that the crane was still moving at the time of the collision (546a, 1026a).

Woodington and the fireman could not see the crane until they were between 700 and 800 feet from the crossing (523a-524a). At that point the emergency brakes were immediately applied (524a), but because it requires about 7 seconds before they become effective (490a), the train was practically at the crossing before its brakes began to operate (1027a). The locomotive hit the boom and front wheels of the crane, knocked it down on its side, and travelled about 3,000 feet east of the crossing before it stopped (114a-115a, 526a).

D. The Charge of the Trial Court Held to Be Erroneous:

The Court of Appeals held that one sentence in the Trial Court's charge, of some twenty-seven printed pages, was erroneous. The Trial Court had charged that the Federal Employers' Liability Act does not place an absolute liability upon the Railroad, but that the Railroad is

liable in damages for negligence, including the failure to supply its employees with a reasonably safe place to work (1170a, 1171a). The Court further charged:

> "In determining whether the Pennsylvania Railroad has complied with this duty of providing a reasonably safe place to work at Longs Road grade crossing, you may consider such things, among others as the following: The nature of the work he was performing; the rules, regulations and orders under which the plaintiff was required to perform his work; the hazards involved; the speed at which the locomotive was to operate; the fact that Longs Road is a public highway; the character of the traffic that may be expected there; the opportunity for visibility afforded the engineer of the locomotive as he approaches that road; the condition of the roadbed at that grade crossing; and the visibility available to a motorist undertaking to cross the tracks at this crossing. In addition, you are to consider, in conjunction with the speed at which the train is directed to be operated by the railroad, the precautions taken by it at Longs Road grade crossing to give advance warning of the approach of a train.
>
> "You may also consider the period of time that elapses from the moment the train first becomes visible to the motorist until the train reaches the grade crossing itself.
>
> "As I have already told you, the law leaves the determination of the speed at which a train may be run to the railroad company. However, the law imposes a further duty upon the railroad company to exercise such care at grade crossings so as to prevent accidents at these points by installing devices which will provide such advance warning of the approach of a train as the circumstances reasonably require.

> "Having given due consideration to all of these various factors and having given such weight to each or any of them as you believe they are entitled, it will be for you to say whether the defendant Pennsylvania has complied with its duty toward the plaintiff of exercising reasonable care and providing him a reasonably safe place to work." (1171a, 1172a)

Immediately thereafter, the Court instructed the jury in the following language, which has been held to be erroneous and prejudicial:

> "In determining this issue, you may consider whether it was reasonably safe, *under all the circumstances,* for the defendant Pennsylvania to specify a 50 miles per hour speed limit if the train could not stop at Longs Road crossing, if necessary, within the visibility of its operator." (1172a) (emphasis added)

While holding that the evidence of Respondent's negligence was adequate to present a jury question, the majority opinion, in holding the above portion of the charge to be prejudicial error, stated:

> "The clear import of this statement is that the Railroad had a duty to operate its trains at such speeds that they could be stopped within the range of their operator's vision." (Appendix A, p. 25, *infra*)

In dissenting, Judge Lumbard disagreed with the meaning assigned by the majority to that portion of the charge. In his view the language of the charge:

> ". . . means only that the Railroad may *under some circumstances* have a duty to operate its trains at such speeds that they can be stopped within the range of their operators' vision. It seems to me that this proposition is unexceptionable." (Appendix A, p. 30, *infra*)

Reasons Why the Writ Should Be Granted

1. By its holding the Court of Appeals has established an important rule of law involving the application of the Federal Employers' Liability Act. This question, of great concern to the entire railroad industry and to each employee protected by the Federal Act, has not been, but should be, decided by this Court. The wide application of the rule was expressly recognized by the majority in its opinion wherein it said:

> "The proposition that a railroad train must be operated at so slow a speed as to permit it to stop within the range of its operator's vision is not supported by authority . . . Such a rule would be obviously detrimental to speedy and efficient railroad operation and would mean that the railroads of the country are daily guilty of negligent operation of their most important trains . . . And its importance in modern railroading is additional reason why it can hardly be overlooked." (Appendix A, p. 27, *infra*)

The conflict between the "speedy and efficient" operation of railroad trains and the right of employees to be afforded a reasonably safe place to work has been determined in favor of the former. An employee's right to have a jury determine, on the basis of all the facts, whether its employer has provided him with a safe place to work, is to be restricted by an inexorable rule of law to the effect that a train need not be operated even over a dangerous crossing so as to be able to stop within the limits of its operator's visibility. Such a drastic limitation on the right to jury trial which ". . . is part and parcel of the remedy afforded railroad workers . . ." (*Bailey* v. *Central Vermont Railroad Co.*, 319 U. S. 350, 354), is erroneous and requires review by this Court.

Whether the Railroad was negligent did not depend, alone, on its establishment of a speed limit greater than one which would permit a stopping of the train within the limits of the engineman's visibility; it was necessary for the jury to consider "under all the circumstances" whether this grade crossing was so dangerous that it was incumbent upon the Railroad to order a reduced speed when approaching it. Reasonable men might give differing answers to this query. But a court should not interfere with the jury's right to give its answer. *Swafford* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807 (memo op.), reversing 220 F. 2d 901 (5th Cir.). Especially is this true in actions involving the rights of employees under the Federal Employers' Liability Act wherein this Court has ruled in favor of the reservation of factual questions for the jury's determination, even in close cases *Lavender* v. *Kurn*, 327 U. S. 645; *Tennant* v. *Peoria etc. R. Co.*, 321 U. S. 29; *Bailey* v. *Central Vermont R. Co., supra.*

In effect, the Court below has held that under none of the facts here could the jury find a duty in the railroad to approach a grade crossing at a rate of speed which would permit the operator to stop within the range of his vision. While the requirements of "modern railroading" necessitate the maintenance of high speed limits, there is also a correlative duty to the employees to protect them by making any high speed a safe speed. This duty is not satisfied by permitting the passage of trains over a known extra-hazardous crossing at fifty miles per hour. Because here was an extra-hazardous grade crossing, made so by the Railroad's negligence, there was sufficient evidence in this case to uphold a determination that a proximate cause of the accident was the Railroad's fixing of a speed greater than that which would permit the train to stop within the visibility of the operator. The charge of the trial court was correct.

2. The majority opinion of the Court below stated that the jury could only reach a "legal verdict" against the railroad if it found "* * * not only that the warnings were inadequate but further, and against the more persuasive evidence, that the crane had not stalled upon the tracks, but was still moving so that the better warnings would have enabled the operator to stop in time to avoid the accident." (Appendix A, p. 28, *infra*) Clearly, the Court has held as a matter of law that the jury could not find the railroad's negligence to have been a proximate cause of the accident unless it first found that the crane was still moving at the time of the collision. This holding conflicts with the decision of this Court in *Schulz* v. *Pennsylvania R. Co.*, 350 U. S. 523, wherein the Court held that it is for the jury to decide, where there is evidence of negligence, whether such negligence was a proximate cause of the accident. There an employee, protected by the Federal Employers' Liability Act was found accidentally drowned. He had been working at night on his employer's moored tug boats, three of which were unlighted. Because of the absence of sufficient help, the employee had to step from one boat to the other in the dark. The Second Circuit's holding that the proof failed to show "where the accident occurred" or "that it was proximately caused by any default on the part of the defendant," was reversed by this Court, which said at p. 525:

> "* * * negligence cannot be established by direct, precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre. But measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. '[W]e think these are questions for the jury to determine.' "

The restrictive position of the Court of Appeals overlooks the heavy evidence of the negligence of the Railroad in the maintenance of its crossing. It shunts aside evidence of the rough roadbed which required vehicles to move slowly over the crossing (151a, 304a) and which might cause stalling; the presence of heavy equipment, aiding in the construction under way on both sides of the crossing (112, 203, 303); testimony that at the time of the accident three locomotives had passed over the unprotected crossing in a matter of minutes to the confusion of the unwary users of the crossing (581a, 1006a); proof that the Reading Railroad slowed its trains to 25 miles per hour over its Longs Road crossing (676a); and other evidence which emphasized the known dangers at that place.

In such circumstances, certainly reasonable members of a jury should be permitted to find an obligation on the part of the Railroad to slow its trains to such a rate of speed that they can be halted when an obstruction, make likely by the known dangers of the crossing, becomes visible to the locomotive operator. The Court below would hold that the mere stalling of a vehicle at a grade crossing is enough to save the railroad from its negligence to its employees in operating its train at a great rate of speed over an unprotected hazardous crossing. In such a situation, the law should not furnish any arbitrary criterion. The degree of care required from the Railroad in order to protect its employees is a question which only a jury should determine, *Schulz* v. *Pennsylvania R. Co., supra, Libengood* v. *Pennsylvania R. Co.,* 358 Pa. 7, 55 A. 2d 756; *Scholl* v. *Philadelphia Suburban Transportation Co.,* 356 Pa. 204, 51 A. 2d 732. The cases cited by the Court below, on page 27 of its opinion (Appendix A, p. 27, *infra*) are cases dealing with stalled vehicles on grade crossings in the open country where there was no evidence, as there is here, that the crossing was an extra-hazardous one. Where the grade crossing is admittedly known to be

dangerous, the railroad is under a duty to see to it that its trains pass over the crossing at a reasonable rate of speed which is proportioned to the dangers involved *Ellis* v. *Lake Shore etc. R. Co.*, 138 Pa. 506, 21 Atl. 140; *Spalding* v. *Louisville & N. R. Co.*, 281 Ky. 357, 136 S. W. 2d 1; *Thompson* v. *The New York Central and Hudson R. Co.*, 110 N. Y. 636, 17 N. E. 690 (memo. op.); 3 Elliot, *Railroads* (3d Ed.), § 1656.

An attempt has been made by the majority opinion to consider separately certain items of evidence and to treat questions of speed and visibility apart from those concerning the adequacy of advance warning. However, the speed of the train, the limited visibility of train operator and crane driver, the inadequacy of advance warning, and all the other proof of negligence in the maintenance of the grade crossing must necessarily be considered as part of the whole. "And especially is this true in a case such as this, where the several elements from which negligence may be inferred are so closely interwoven as to form a single pattern, and where each impart character to the others" (*Blair* v. *Baltimore and Ohio R. Co.*, 323 U. S. 600, 604). The duty of a railroad to its employee, who is passing over a guarded crossing which is properly maintained by it, is of a nature less strict than the duty which must be imposed upon the Railroad in this case. In the former situation, trains may travel at high rates of speed without the imposition of liability in negligence in the event of a collision through the fault of another. In the latter, the jury may very well find that a proximate cause of the accident is the failure of the railroad to move its train at such a rate of speed that it can be checked in time to avoid a collision.

Fault cannot be measured with precision. "Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses

or proof of circumstances from which inferences can fairly be drawn." *Schulz* v. *Pennsylvania R. Co., supra,* p. 526. Here, the Court of Appeals requires that fact finding be restricted by instructions which would forbid the jury from finding any liability in the railroad if the crane was stalled on the tracks. In addition, the Court would require the elimination from the instructions to the jury of any suggestion that the speed of the train in this case should have been limited to the range of vision of the locomotive operator.

The instructions to the jury cover many printed pages. Only one alleged error, in one sentence, in all of the charge can be pointed to. The Court below agrees that there was evidence of the Railroad's negligence. Yet this one sentence in the charge has been held enough to require a relitigation of the employee's rights against his employer. "Dialectical perfection, metaphysical nicety, abstract inerrancy * * *" are not required in the trial court's instructions to a jury. *Dallas R. & Terminal Co.* v. *Sullivan,* 108 F. 2d 581, 584 (5th Cir.) As the dissenting Judge, below, stated:

> "The issues in this case were relatively simple and in view of the careful and comprehensive charge which Judge Bicks gave I think it is unrealistic to suggest that the jury did not understand them. That the jury would have reached a different result had the charge of the judge been more detailed and specific on the point which troubles my brothers seems to me highly doubtful. Indeed to labor this point, as the majority would have the trial judge do, might well give it undue emphasis and create confusion where none already exists. Such questions of emphasis and detail should be left to the sound discretion of the district judges, especially where the parties suggest nothing which is any better than the language used." (Appendix A, p. 33, *infra*).

By its decision in this case, the Court of Appeals has limited the rights of employees under the Federal Employers' Liability Act, has restricted the fact finding powers of juries, and has established a principle of law of serious concern to all in the railroad field. If it is to be held that rights afforded to employees by the Federal Employers' Liability Act are to be whittled away by strict rules of law which establish a carrier's freedom from negligence in all similar cases, it is desirable that this Court so ordain.

Conclusion

WHEREFORE, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

JOSEPH LORENZ,
Counsel for Petitioner.

C. J. PERNICONE,
CONSTANTINE P. LAMBOS,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 334—October Term, 1955.

(Argued April 12, 1956 Decided August 22, 1956.)

Docket No. 24000

WALLACE WOODINGTON,

Plaintiff-Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY and S. J. GROVES & SONS CO., INC., a Minnesota corporation, Eagle, Pennsylvania,

Defendants-Appellants.

Before:

CLARK, *Chief Judge,* and
HINCKS and LUMBARD, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge.*

The Pennsylvania Railroad Company and S. J. Groves & Sons Co., Inc., appeal from a judgment on a verdict against them of $297,500 for damages for personal injuries in favor of the plaintiff, Wallace Woodington. Affirmed as to S. J. Groves & Sons Co., Inc.; reversed and remanded as to The Pennsylvania Railroad Company.

Appendix A

B. NATHANIEL RICHTER, of RICHTER, LORD & LEVY, of Philadelphia, Pa. (Leo Gitlin, New York City, on the brief), *for plaintiff-appellee.*

PHILIP PRICE, Philadelphia, Pa. (Robert M. Landis, Philadelphia, Pa. and David J. Mountan, Jr., of Conboy, Hewitt, O'Brien & Boardman, New York City, on the brief), *for defendant-appellant The Pennsylvania Railroad Company.*

JOHN F. X. FINN, New York City (Cohen & McGuirk and Constantine P. Lambos, New York City, on the brief), *for defendant-appellant S. J. Groves & Sons Co., Inc.*

CLARK, *Chief Judge*:

This is an appeal by both defendants from a judgment against both in the amount of $297,500 entered after trial before Judge Bicks and a jury. Plaintiff Woodington, a Pennsylvania Railroad engineman, sustained serious injuries when the freight train on which he was then acting as fireman collided with a six-wheel, motor-powered crane weighing more than 24½ tons, which stalled on the railroad tracks at the Longs Road grade crossing near King of Prussia, Pennsylvania. Plaintiff brought this action against the Pennsylvania Railroad under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, and against Groves at common law for negligence, invoking the diversity-of-citizenship jurisdiction of the court.

On the day of the accident Woodington's 67-car freight train was traveling east through a sparsely settled area on a double-track line which curves toward and then crosses Longs Road, a little-used spur road connecting two high-

ways. The crossing was guarded by standard reflector-type, cross-buck warning signs, which had been installed under an order of the Pennsylvania Public Utility Commission after a public hearing upon the railroad's application to close off the crossing entirely. From a safe position clear of the crossing there is a view of the tracks toward the west, the direction from which the train approached, and a reciprocal view from the train to the crossing variously estimated by witnesses as from 700 feet to one-half mile.

The crane, which was equipped with a 20-foot boom extending ahead of its cab, approached the railroad tracks and stopped about 40 feet away from the first rail. After waiting for another freight train and engine to clear the crossing, the crane operator, directed by his assistant standing outside the crane on the crossing, began to move the heavy vehicle slowly over the crossing. While in the process of moving over the tracks, the crane stalled; and efforts by the operator to start it again were futile.

Woodington's train, then being operated by the fireman, McDonald, was approaching at a speed variously estimated at from 30 to 50 miles per hour. Fifty miles per hour was the speed authorized by the railroad company in that section. McDonald, although acting as a fireman on this run, had had long experience as an engineer. There was testimony that he blew the customary warning whistle at the eastbound whistle board approximately 1470 feet from the crossing. Woodington testified that he could first see the crane after the train rounded the curve at a distance of about 800 feet from the crossing. He thought the crane was then still moving forward. The crane operator, however, estimated that it was stalled on the tracks from a minute and a half to two minutes. McDonald promptly applied the brakes, which functioned properly; but the train was unable to stop before crashing into the heavy crane. The crane operator jumped to safety shortly before the collision, but Woodington received serious, and McDonald fatal, injuries.

Appendix A

For several months before the accident defendant Groves had been engaged in construction work on the Pennsylvania Turnpike and had used the crane in connection with this work. Because of its large bulk the crane was prohibited by the Pennsylvania Vehicle Code from being moved on th highways without a special permit issued for a single trip by the Secretary of Highways, subject to certain regulations and conditions prescribed in the permit.[1] The regulations required the permittee to follow the route prescribed by the highway officials, and stated that nothing in the permit should be construed to authorize crossing railroad tracks at grade without first notifying and making proper arrangements with the railroad company. At the time of the accident the crane was being operated without the required permit. Though it was crossing at grade, this was not necessary; the underpass for State Highway Route 23 is about 300 yards west of the Longs Road crossing, and beyond this underpass is a vehicular bridge over the Pennsylvania tracks at Croton Road.

There was testimony that the Pennsylvania Railroad had an established procedure under which, if it were notified of intended movements of heavy equipment over grade

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[1] Pennsylvania Vehicle Code, Act of May 1, 1929, P. L. 905 as amended, §§ 901, 905, 75 Pa. Stat. Ann. §§ 451, 455. Sec. 901 contains a prohibition against the operation on public highways of all oversized, overweight vehicles. Sec. 905 provides in part:

"(a) The Secretary of Highways of this Commonwealth, and local authorities in their respective jurisdictions, may, in their discretion, upon application in writing accompanied by the fee provided in this act, and good cause being shown therefor, issue a special permit, in writing, authorizing the applicant to operate or move * * * a vehicle * * * of a size or weight exceeding the maximum specified in this act upon any highway under the jurisdiction of and for the maintenance of which the authorities granting the permit are responsible. * * * Every such permit shall be issued for a single trip, and shall designate the route to be traversed, subject to such rules, regulations, restrictions, or conditions, as shall be deemed necessary by the authority granting such permit. * * *"

crossings, it would hold the equipment at the crossing until there was a suitable interval between trains, then set block signals against trains in both directions, and permit the equipment to cross under the supervision of a railroad employee. Groves gave no notice to the railroad of the intended crossing which resulted in this accident, and the special procedure was not invoked.

Groves' Vice-President McKay, who was in charge of the project to which the crane was assigned, testified that on his project he would sometimes take a chance and move a vehicle without getting a permit; if he were caught he would pay the fine, and if not, he would escape paying the permit fee. Groves' Vice-President Klock, who was in charge of another Groves' highway project in the area, testified that he never permitted his overweight vehicles to move without a permit and, before crossing railroad tracks at grade, communicated with the railroad company, which then set a time when it was safe to cross.

Several days before the accident the crane had been moved from McKay's project at Eagle, Pennsylvania, to Klock's project at Conshohocken. For that movement a permit was obtained from the Pennsylvania Department of Highways which required the crane to go by way of the Route 23 underpass, so that it would not go over the Pennsylvania tracks at grade. On that trip the crane passed safely through the underpass after the crane operator and his assistant turned the boom around. On the return trip from Conshohocken to Eagle no permit was obtained; and, in order to save the trouble and possible damage to the vehicle involved in reversing the boom, the operators used the Longs Road grade crossing instead of the underpass prescribed by the Department of Highways. There was further evidence that the crane had had engine trouble prior to the accident and had stalled on several prior occasions; a minor repair was made on the morning of the accident.

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Fireman McDonald's widow and executrix brought an action for his wrongful death resulting from this same accident in the federal district court in Pennsylvania. The jury there returned a verdict against Groves, but in favor of the Pennsylvania Railroad. McDonald's appeal from the verdict in favor of the Pennsylvania was dismissed as defectively raised, but the Third Circuit affirmed the judgment against Groves. *McDonald* v. *Pennsylvania R. Co.*, 3 Cir., 210 F. 2d 524.

Appeal of S. J. Groves & Sons Co., Inc.

In the matter of Groves' appeal we reach the same result as the Third Circuit, *McDonald* v. *Pennsylvania R. Co., supra,* 3 Cir., 210 F. 2d 524, 530, and accept the analysis made by that court of the arguments presented by Groves, the more significant of which are similar to those offered here. The court there said: "In the case at bar a man was killed by reason of a senseless accident caused by the indifference of the employees of a large contracting company, reflected by at least one of its officers, to the laws of Pennsylvania governing highway traffic." Indeed, there was more than sufficient evidence to justify submission of the case to the jury. Thus the jury could predicate Groves' negligence on one or more of four factors: (1) failure to secure the permit required by the Pennsylvania Code, see *Jackson* v. *Blue,* 4 Cir., 152 F. 2d 67; 2 Restatement, Torts § 286 (1934); (2) failure to notify the railroad authorities of its intention to take this crane over the grade crossing; (3) choosing the grade crossing, rather than the underpass, as a route to move its crane, see *Starovetsky* v. *Pennsylvania R. Co.*, 328 Pa. 583, 195 A. 871; *Tharp* v. *Pennsylvania R. Co.*, 332 Pa. 233, 2 A. 2d 695; *Simpkins* v. *Pennsylvania R. Co.*, 334 Pa. 1, 5 A. 2d 103; *Scurco* v. *Kart,* 377 Pa. 435, 439, 105 A. 2d 170; and (4) stalling the crane at the crossing.

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The Pennsylvania statute was intended both to prevent damage to highways and to promote traffic safety. Had Groves obeyed the statute, selected the safer route, or followed the railroad's special crossing procedure, the jury could reasonably infer that no accident would have occurred. It could also infer that the stalling resulted from either negligent maintenance or negligent operation of the vehicle. Further, we think Groves' attempt to show Woodington guilty of contributory negligence as a matter of law based on calculations of train speed must fail; this was clearly a jury question.

There is no substance to Groves' various assignments of error in the admission of evidence. It is claimed that plaintiff was erroneously permitted to introduce evidence of a prior contradictory statement of the crane operator, who was plaintiff's witness, concerning the passing of a westbound freight prior to the arrival of Woodington's train. But it is by no means clear that objection was raised to this testimony at the trial on the ground that plaintiff was attempting to impeach his own witness, the ground raised on appeal. In any event the alleged error involved a peripheral matter and was quite harmless.

We further find no error in the charge as to Groves. Nor on the evidence of serious and extensive injuries to plaintiff do we think there was any abuse of discretion in failing to set aside the verdict as excessive. See *Comiskey* v. *Pennsylvania R. Co.*, 2 Cir., 228 F. 2d 687; *Stevenson* v. *Hearst Consol. Publications*, 2 Cir., 214 F. 2d 902, 910-911, certiorari denied *Hearst Consol. Publications* v. *Stevenson*, 348 U. S. 874.

Appeal of the Pennsylvania Railroad

The appeal of the Pennsylvania Railroad presents more difficulty. The case against this defendant was given to the jury on the theory that it could find that the Pennsylvania

had failed to provide plaintiff with a reasonably safe place to work upon a determination that the warning devices at the Longs Road crossing were inadequate when considered in connection with the speed of the train and the distance from the crossing to the point where the train became visible after rounding the curve. The determination of that question in this action brought under the Federal Employers' Liability Act is governed by federal, rather than Pennsylvania, law. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361.

There was some evidence before the jury that the train was moving at a speed of 50 m.p.h. and that its crew were unable to see the crane at the crossing until they were within 700 to 800 feet. It was then too late to stop the train in time to avoid the collision. There was also some evidence that the crane was still moving when the train rounded the curve. On the basis of this evidence it would have been possible to find that more adequate warning devices (such as bells or blinker lights) at the crossing might have forestalled the accident by inducing the crane operator to refrain from moving his machine into the path of a train approaching rapidly from behind a curve. See *Swafford* v. *Atlantic Coast Line R. Co.*, 350 U. S. 807, reversing *per curiam* without opinion, 5 Cir., 220 F. 2d 901; *Bailey* v. *Baltimore & O. R. Co.*, 2 Cir., 227 F. 2d 344 (decided under the law of New York); *Cahill* v. *New York, New Haven & Hartford R. Co.*, 350 U. S. 898, reversing *per curiam* without opinion, 2 Cir., 224 F. 2d 637; *O'Neill* v. *Baltimore & O. R. Co.*, 348 U. S. 956; *Stone* v. *New York, C. & St. L. R. Co.*, 344 U. S. 407; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350; Note, 69 Harv. L. Rev. 1441. While the evidence of negligence was thus not extensive, we regard it as adequate to present a jury question under our modern Supreme Court decisions.

But the charge under which the case was presented to the jury was erroneous in one aspect and, we fear, sub-

stantially prejudicial. The court was charging in some detail as to the obligation of the railroad to provide plaintiff with a reasonably safe place in which to work and reasonably safe working conditions and went on to say: "In determining this issue, you may consider whether it was reasonably safe, under all the circumstances, for the defendant Pennsylvania to specify a 50 miles per hour speed limit if the train could not stop at Longs Road crossing, if necessary, within the visibility of its operator."[2]

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[2] The part of the charge from which this paragraph is excerpted reads as follows:

"The act also requires the railroad employer to provide its employees with a reasonably safe place in which to work and reasonably safe working conditions.

"This duty of providing a safe place to work is a continuing one. It applies to each and every place where the plaintiff may be required to work in the performance of his duties as an employee of this defendant. It continues even though the employee may be at any given point, in this case, for instance, at Longs Road grade crossing, for but a fleeting moment of time.

"In determining whether the Pennsylvania Railroad has complied with this duty of providing a reasonably safe place to work at Longs Road grade crossing, you may consider such things, among others, as the following: The nature of the work he was performing; the rules, regulations and orders under which the plaintiff was required to perform his work; the hazards involved; the speed at which the locomotive was to operate; the fact that Longs Road is a public highway; the character of the traffic that may be expected there; the opportunity for visibility afforded the engineer of the locomotive as he approaches that road; the condition of the roadbed at that grade crossing; and the visibility available to a motorist undertaking to cross the tracks at this crossing. In addition, you are to consider, in conjunction with the speed at which the train is directed to be operated by the railroad, the precautions taken by it at Longs Road grade crossing to give advance warning of the approach of a train.

"You may also consider the period of time that elapses from the moment the train first becomes visible to the motorist until the train reaches the grade crossing itself.

(*Footnote continued on following page*)

The clear import of this statement is that the railroad had a duty to operate its trains at such speeds that they could be stopped within the range of their operators' vision. Nor does the phrase "under all the circumstances" render this aspect of the railroad's conduct merely one more factor in determining the adequacy of warning signals. Upon the crane operator's testimony, the crane was stalled on the tracks for 1½ to 2 minutes before the collision. No known type of warning device could have prevented the crane from attempting to cross the tracks such a long

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(*Footnote continued from preceding page*)

"As I have already told you, the law leaves the determination of the speed at which a train may be run to the railroad company. However, the law imposes a further duty upon the railroad company to exercise such care at grade crossings so as to prevent accidents at these points by installing devices which will provide such advance warning of the approach of a train as the circumstances reasonably require.

"Having given due consideration to all of these various factors and having given such weight to each or any of them as you believe they are entitled, it will be for you to say whether the defendant Pennsylvania has complied with its duty toward the plaintiff of exercising reasonable care and providing him a reasonably safe place to work.

[Here followed the statement quoted in the text. The charge then continued:]

"You may take into consideration the fact that the railroad complied with the requirements of the Public Utility Commission of Pennsylvania as to the warning installations at Longs Road crossing. In this connection, I instruct you, however, that the decree of the Pennsylvania Public Utility Commission that directed certain advance warning signs of the presence of tracks alone be installed is not binding or conclusive on the plaintiff on the issue whether the railroad supplied the plaintiff with a reasonably safe place to work.

"The ultimate decision of whether, in the light of all the circumstances in this case, the railroad company provided the plaintiff with a safe place to work is for you and you alone in the light of all the evidence."

time before the arrival of the train. And once the vehicle had stalled on the tracks, the activation of a warning device could have had no effect in avoiding the collision. Hence only if the jury believed Woodington's testimony that the crane was still moving toward the tracks shortly before the accident could it reasonably conclude that the nature of the warning devices had anything to do with the collision. And only on this state of the facts would train speed and range of the train operator's vision be proper matters for the consideration of the jury. See *Plough* v. *Baltimore & O. R. Co.*, 2 Cir., 172 F. 2d 396, certiorari denied 337 U. S. 940. But the state of the evidence made rather likely a conclusion that the crane was stalled for an appreciable period before the crash, and hence a considerable possibility, if not probability, that the jury would take the quoted charge quite seriously to find some duty on the part of the engineman to be able to stop the train at any point along the track within the range of its operator's vision, in order to avoid the dangers of stalled objects lodged on the right of way. Thus the error in failing to exclude such an interpretation, and indeed of substantially suggesting it, was serious.

Moreover, the speed of the train and the ability to stop within the engineer's range of vision were factors which were completely irrelevant if the jury found—as it well might have done—that, in view of Pennsylvania law with respect to overweight vehicles and the railroad's practice with respect to their crossing at grade, the locomotive cab was a reasonably safe place in which to work even during the fleeting moments when it was passing the Longs Road crossing. Thus, in effect, the portion of the charge excepted to practically invited the jury to predicate negligence on factors which on its other findings may have been irrelevant. So it was nowhere limited and declared to be inapplicable to a state of facts here highly probable,

where the adequacy of the warning signals would have no connection with the accident.

The proposition that a railroad train must be operated at so slow a speed as to permit it to stop within the range of its operator's vision is not supported by authority. See *Guyler* v. *Lehigh Valley R. Co.*, 165 Pa. Super. 196, 67 A. 2d 575; *Custer* v. *Baltimore & O. R. Co.*, 19 Pa. Super. 365, affirmed 206 Pa. 529, 55 A. 1130; *Veres* v. *Pennsylvania R. Co.*, 161 Pa. Super. 177, 54 A. 2d 77; *Homeland Ins. Co.* v. *Thompson*, La. App., 12 So. 2d 62; *Seaboard Airline R. Co.* v. *Crowder*, 191 Va. 635, 62 S. E. 2d 227. Such a rule would be obviously detrimental to speedy and efficient railroad operation and would mean that the railroads of the country are daily guilty of negligent operation of their most important trains. We must of course consider the charge as a whole to determine its over-all effects as to whether they indicated prejudice requiring a new trial. And it is true that the charge in certain paragraphs refers to speed, visibility, warning devices, and other pertinent matters as important factors in determining the degree of care exercised by the railroad here. But nowhere does it distinguish the governing principles of law according to their applicability to the quite distinct situations of a long-stalled vehicle and a vehicle just approaching the crossing. Indeed the very emphasis on such factors as visibility both to the trainmen and to motorists adds to the implication that speed must be limited by visibility. So, too, the detail of the charge as to the duty to furnish a safe place in which to work, continuing even though the employee was at the crossing "for but a fleeting moment of time," serves to highlight the error. And its importance in modern railroading is additional reason why it can hardly be overlooked.

It is now suggested that the judge meant the restriction on train speed to apply only when (as the jury must have found) the crossing warnings were inadequate. But this

is a *post-hoc* rationalization not within the judge's thought,[3] and dependent for its validity on those very premises which we have questioned above as not explained to the jury. For, as we have pointed out, the jury in order to reach a legal verdict had to find not only that the warnings were inadequate,[4] but further, and against the more persuasive evidence, that the crane had not stalled upon the tracks, but was still moving so that the better warnings would have enabled the operator to stop in time to avoid the accident. The more natural view, both from what the jurors were told and from what they were not told, is, however, that they understood that the engineman must be able to stop his train in time to avoid an obstacle he saw before him on the track. And what this would mean to modern railroading is shown by the expert testimony that this train, going at 50 miles per hour, would actually require about 4500 feet for an emergency stop.

Exception was clearly taken and pressed to the charge as given.[5] While reversal of a judgment on a jury verdict is always a serious matter, yet it seems appropriate to

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[3] In addition to the wording of the charge itself, note may be taken of the colloquy of the judge with counsel for defendant in refusing a request to charge and in stating that the question of the 50-mile rate of speed must be considered under the circumstances of "limited vision" present and giving as example a "gate" crossing where a speed of 70 or 80 miles an hour might not be negligent. Thus while he was plainly correlating speed with physical conditions as they might exist, the judge was not defining the railroad's duty as increased by its default.

[4] Despite the railroad's full compliance with the order of the Pennsylvania Public Utility Commission entered on refusal of the railroad's application for the closing of the grade crossing.

[5] Defendant specifically objected to leaving to the jury as negligence the question of being able to stop within the range of vision and was going on to explain "that the mere fact that the train could not be stopped within the range of vision—" when the judge stopped counsel and gave him a general exception. See also note 3 *supra*.

point out that here justice may well be subserved thereby. It is quite clear that the negligence of Groves was gross, while that of the Pennsylvania was slight and based upon rather limited and debatable evidence. This the jury undoubtedly sensed; near the beginning of its deliberations it sought to find whether it could establish degrees of negligence between the defendants and being told that it could not, nevertheless continued in rather lengthy deliberations. Under the circumstances, it seems particularly desirable that a finding against this defendant should be without taint of legal error.

We are therefore constrained to conclude that the Pennsylvania Railroad must have a new trial because of the prejudicial charge. In view of this conclusion we need not reach the question of the alleged prejudicial remarks made by Groves' counsel in summation. Although these efforts to create prejudice against the railroad were improper, we agree with the forceful, if inelegant, conclusion of the judge that the jury "would not be influenced by such tripe."

Affirmed as to defendant Groves; reversed and remanded for a new trial as to defendant The Pennsylvania Railroad Company.

LUMBARD, *Circuit Judge* (concurring as to Groves and dissenting as to Pennsylvania Railroad Co.):

I concur in the opinion of the majority insofar as it relates to the appeal by Groves. I am constrained to dissent, however, from that portion of the opinion which reverses the judgment against the Pennsylvania Railroad.

My brothers concede that there is sufficient evidence in the record to justify a jury finding that more adequate warning devices at the crossing might have forestalled the accident. They find error, however, in that portion of the charge where Judge Bicks instructed the jury as follows:

> "In determining this issue, you may consider whether it was reasonably safe, *under all the circumstances,* for the defendant Pennsylvania to specify a 50 miles per hour speed limit if the train could not stop at Longs Road crossing, if necessary, within the visibility of its operator." (Emphasis supplied.)

My disagreement with the majority is highlighted by Judge Clark's statement that "The clear import of this statement is that the railroad had a duty to operate its trains at such speeds that they could be stopped within the range of their operators' vision." To me Judge Bicks' language taken in its context does not have that meaning. It means only that the railroad may *under some circumstances* have a duty to operate its trains at such speeds that they can be stopped within the range of their operators' vision. It seems to me that this proposition is unexceptionable. If the railroad fails to provide devices at the crossing which will give adequate warning of approaching trains, then it may well have a duty to slow its trains to the point where they can be stopped before reaching the crossing. It seems to me that this is all that Judge Bicks was saying and that it is all that the jury could have understood him to mean.[1]

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[1] The majority opinion suggests that this is a "post-hoc rationalization not within the judge's thought * * *" It seems to me, however, that the colloquy to which Judge Clark refers in his footnote 8 indicates quite clearly that this is precisely what Judge Bicks had in mind and what he intended to convey to the jury. Thus as a part of that colloquy Judge Bicks said:

> "Where you have this kind of warning signal, then you consider that in connection with the rate of speed at which you pass that place, and you consider the rate of speed in connection with the warning signal. If you had a gate crossing and if you were going 70 or 80 miles an hour, I might be inclined

(*Footnote continued on following page*)

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Just a few paragraphs before the language to which the majority objects, Judge Bicks had given the jury a comprehensive list of the factors to be considered in determining whether Pennsylvania was negligent, including the hazards involved, the speed at which the locomotive was to operate, the character of the traffic to be expected at the crossing, the engineer's visibility approaching the crossing, and a motorist's visibility approaching the track. That paragraph concluded with the following language:

> "In addition you are to consider *in conjunction with the speed at which the train is directed to be operated by the railroad,* the precautions taken by it at Longs Road grade crossing to give advance warning of the approach of a train." (Emphasis supplied.)

He then said:

> "As I have already told you, the law leaves the determination of the speed at which a train may be run to the railroad company. However, the law imposes a further duty upon the railroad company to exercise such care at grade crossings as to prevent accidents at these points by installing devices which will provide for such advance warning of the approach of a train as the circumstances reasonably require.

(*Footnote continued from preceding page*)

> to say that you were not negligent. You must fix a rate of speed under which those conditions are reasonable and prudent, and the jury has a right to consider that as to whether the rate of speed under those circumstances with that limited visibility and that kind of a crossing, was reasonable."

I think this discussion demonstrates that Judge Bicks intended to hold the railroad to a duty of making the crossing reasonably safe either by providing signals adequate for high-speed trains or by slowing the trains. The example which he gave clearly indicates that if adequate signals were maintained there would be no duty to operate the trains at speeds such that they could be stopped within the visibility of the operator.

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> "Having given due consideration to all these various factors and having given such weight to each or any of them as you believe they are entitled, it will be for you to say whether the defendant Pennsylvania has complied with its duty toward the plaintiff of exercising reasonable care and providing him with a reasonably safe place to work."

When Judge Bicks then continued with the language now complained of, I think it must have been clear to the jury that his meaning was that Pennsylvania had a duty to make the crossing reasonably safe either by providing adequate warning devices or by operating its trains slowly enough to stop before reaching the crossing. He did not instruct them that they might find that the railroad must operate its trains slowly enough to stop within the visibility of the engineer in all situations, including those where adequate warning devices are provided.

Pennsylvania's counsel, in taking exception to Judge Bicks' charge, made no argument that undue emphasis had been placed on the element of the train speed or that it had been improperly singled out as a separate ground of negligence. He argued rather that the train speed was not an element of negligence at all and his requested instruction was to that effect. But it seems to me quite clear that the adequacy of the signals could not properly be considered apart from the speed of the trains and that Judge Bicks was therefore justified in refusing Pennsylvania's request and in instructing the jury that both of these factors should be considered in determining whether the railroad was negligent.

Since Judge Bicks properly enunciated the principles upon which the jury's decision was to rest, I think there is no reason to speculate that they might have accepted one version of the facts rather than another and applied the principle in a situation where it was not properly

applicable. Nor do I think that the trial judge was bound to give an additional instruction that if the crane had been stalled for some time the inadequacy of the signals could not be a proximate cause of the accident. This is what the majority seems to require. But counsel for Pennsylvania neither requested nor suggested such an instruction, nor was any exception taken to the instruction on causation which Judge Bicks gave. Thus under Rule 51, Federal Rules of Civil Procedure, we should not now consider objections to that portion of the charge. For us to permit a fine-tooth combing of the charge to find error which was not clearly indicated at the required time seems to me to do violence to the spirit of the rule and the reasons which led to its adoption.

The issues in this case were relatively simple and in view of the careful and comprehensive charge which Judge Bicks gave I think it is unrealistic to suggest that the jury did not understand them. That the jury would have reached a different result had the charge of the judge been more detailed and specific on the point which troubles my brothers seems to me highly doubtful. Indeed to labor this point, as the majority would have the trial judge do, might well give it undue emphasis and create confusion where none already exists. Such questions of emphasis and detail should be left to the sound discretion of the district judges, especially where the parties suggest nothing which is any better than the language used.

This accident occurred on May 19, 1950. Five years later the trial took place from April 19 to May 6, 1955. Now after six years my brothers reverse and require a retrial because the district judge should have put a few more words on the other side of the scales. I must say that I think we usurp the function of the District Court and do small service to the sensible and orderly disposition of its civil business to reverse this judgment against the Pennsylvania Railroad.

APPENDIX B

Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U.S.C. §§ 51, et seq.

§ 51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, truck, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

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§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Apr. 22, 1908, c. 149, § 2, 35 Stat. 65.

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

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§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 55. Contract, rule, regulation or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. Apr. 22, 1908, c. 149, § 5, 35 Stat. 66.

§ 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

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Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.

§ 57. WHO INCLUDED IN TERM "COMMON CARRIER."

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier. Apr. 22, 1908, c. 149, § 7, 35 Stat. 66.

§ 58. DUTY OR LIABILITY OF COMMON CARRIERS AND RIGHTS OF EMPLOYEES UNDER OTHER ACTS NOT IMPAIRED

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress. Apr. 22, 1908, c. 149, § 8, 35 Stat. 66.

§ 59. SURVIVAL OF RIGHT OF ACTION OF PERSON INJURED

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases

there shall be only one recovery for the same injury. Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291.

§ 60. PENALTY FOR SUPPRESSION OF VOLUNTARY INFORMATION INCIDENT TO ACCIDENTS; SEPARABILITY CLAUSE

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby. Apr. 22, 1908, c. 149, § 10, as added Aug. 11, 1939, c. 685, § 3, 53 Stat. 1404.

In the

Supreme Court of the United States

October Term, 1934.

No. 592.

S. J. GROVES & SONS CO., INC., a Minnesota Corporation, Eagle, Pennsylvania, Individually and as Assignee of Wallace Woodington,

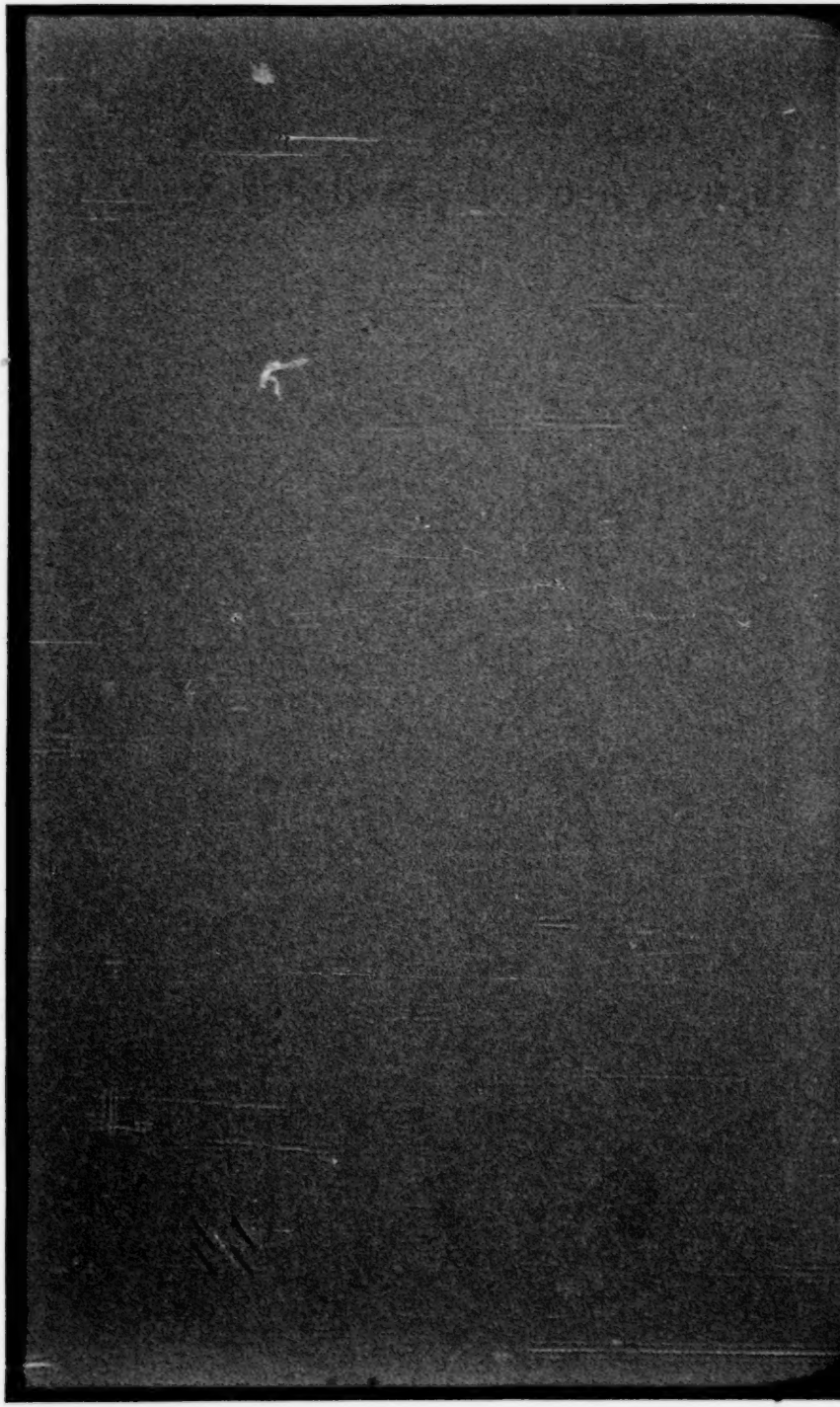
Petitioner,

v.

THE PENNSYLVANIA RAIL-ROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1956.

No. 592.

S. J. GROVES & SONS CO., INC., A MINNESOTA CORPORATION, EAGLE, PENNSYLVANIA, INDIVIDUALLY AND AS ASSIGNEE OF WALLACE WOODINGTON,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION.

The judgment of the United States Court of Appeals for the Second Circuit affirming the judgment against petitioner, S. J. Groves & Sons, Inc., and reversing the judgment and remanding the case for a new trial as to respondent, The Pennsylvania Railroad Company, was entered on August 27, 1956 (1272a). This judgment was vacated by an order dated September 17, 1956 (1281a), and a new judgment, affirming the judgment as to Groves and reversing the judgment as to the railroad company and remanding the case for a new trial as to that defendant, limited to the issue of liability alone, was filed on September 17, 1956 (1282a).

The jurisdiction of this court is invoked under 28 U. S. C., Section 1254(1). Groves filed its petition for a writ of certiorari "individually and as Assignee of Wallace

Woodington". The petition raises no question as to the propriety of the judgment against petitioner, which it has paid, but merely challenges the correctness of the order of the court below reversing the judgment as to the railroad company and remanding the case for a new trial as to it alone.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether a defendant (petitioner) which has paid to the plaintiff the full amount of a judgment against it and has taken an assignment of that judgment, has legal standing to petition for review of an order reversing a judgment against another defendant (respondent) and remanding the case for a new trial in a proceeding in which (a) petitioner and respondent were not adversary parties, (b) petitioner neither raised nor argued in the court below any question affecting the propriety of the order reversing the judgment as to the other defendant (respondent), and (c) the issues between plaintiff and respondent have become moot?

2. Whether an order remanding for a new trial an action between plaintiff and respondent for a new trial because of the trial court's faulty analysis of the evidence and erroneous application of an established legal principle in its charge to the jury, merits review on petition for certiorari, not by the plaintiff but by another defendant, where the issues affected by the order may be made moot by the disposition of a pending cross-claim for contribution between petitioner and respondent?

STATUTE INVOLVED.

The statute involved is the Federal Employers' Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U. S. C. § 51, *et seq.* the text of which is set forth in Petitioner's Appendix B, pp. 34-38.

STATEMENT OF THE CASE.

On May 19, 1950 Wallace Woodington, a Pennsylvania Railroad engineman, sustained serious injuries when the freight train, on which he was then acting as fireman, collided with an oversize, overweight, motorized crane of S. J. Groves & Sons Company, Inc., which was being moved illegally without the special permit required by the Pennsylvania Vehicle Code and had stalled on the Longs Road grade crossing near King of Prussia, Pennsylvania. Woodington brought suit in the United States District Court for the Southern District of New York against the railroad company under the Federal Employers' Liability Act [45 U. S. C. § 51 et seq.], and against Groves at common law under the court's diversity jurisdiction [28 U. S. C. § 1332].[1]

The case was tried before District Judge Bicks and a jury, from April 19, to May 6, 1955, and a verdict was returned in favor of the plaintiff against both defendants in the amount of $297,500.00. Petitioner and respondent both appealed to the United States Court of Appeals for the Second Circuit (1240a-1242a). That court affirmed the judgment against petitioner and reversed the judgment against respondent, remanding the case for a new trial, on the issue of liability alone, on the ground that the charge of the trial judge was prejudicially erroneous as to the railroad company, and that justice required a new trial as to it (Petitioner's Appendix A, pp. 22-29). Instead of petitioning for a writ of certiorari to review the judgment

1. In a suit against these same defendants by the estate of the deceased fireman, who was killed in the accident, the United States Court of Appeals for the Third Circuit affirmed plaintiff's judgment against Groves and dismissed plaintiff's appeal from the judgment on a verdict in favor of the railroad company. *McDonald v. Pennsylvania Railroad Company,* 210 F. 2d 524 (3rd Cir. 1954). The opinion by Chief Judge Biggs for the unanimous court is printed as Appendix A to Respondent's Brief, pp. 21 to 31, below.

which was affirmed against it, Groves paid that judgment and took an assignment of it from Woodington.[2]

Thereafter Groves, "individually and as assignee of Wallace Woodington", filed its petition for a writ of certiorari to the Court of Appeals for the Second Circuit. That petition is based entirely upon errors alleged to have been committed by the court below, not in respect of the judgment entered against it, but in ordering a new trial of Woodington's suit against the railroad company under the Federal Employers' Liability Act.

On the day of the accident Woodington's sixty-seven car freight train was traveling east on the Trenton Cut-off, one of the respondent's main freight lines. In a sparsely settled section near King of Prussia, Pennsylvania, this two-track line curves toward and crosses Longs Road, a little-used spur road connecting Pennsylvania State Highway Route 23 with United States Route 202 (Exhibits P-1, P-38, 38a, 354a, 385a, 448a).[3] The crossing was guarded by standard reflector-type, cross-buck warning signs which had been installed by the railroad company under an order of the Pennsylvania Public Utility Commission issued, after a public hearing, on March 13, 1950 (Pennsylvania's Exhibit MM, 765a, 799a). From a safe position clear of the crossing there is a view to the west, the direction from which the train approached, which was variously estimated at from 1500 feet to approximately half a mile (204a, 207a, 445a, 763a, 797a).

About 300 yards west of the Longs Road crossing is the underpass for State Highway Route 23 and some distance beyond this underpass is a vehicular bridge over the Pennsylvania tracks at Croton Road (Exhibits P-1, P-38,

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2. The assignment of the judgment is printed as Appendix B to Respondent's Brief, pp. 32 to 34, below.

3. All references to exhibits and page references followed by the letter "a" refer to pages of the printed Appendix to Defendants-Appellants' Briefs in the Court of Appeals.

P-39, 348a, 350a, 370a). During the fourteen years before the date of the accident, the only period for which accident records were available, there had never been an accident of any kind at the Longs Road crossing (669a-670a).

For several months before the accident, Groves had been engaged in construction work on the Pennsylvania turnpike system (184a, 224a) on which it used the four-year old army surplus crane that was involved in the accident (187a). The crane was a six-wheeled vehicle weighing over twenty-four and one-half tons (208a), with a projecting boom which, in normal position, extended twenty feet ahead of the cab (121a). Because of its excessive weight it was prohibited by the Pennsylvania Vehicle Code from being moved on the highways without a special permit, issued for a single trip by the Secretary of Highways and subject to certain regulations and conditions prescribed in the permit (199a, 208a, Pennsylvania's Exhibits GG and HH, 750a-753a).[4] The regulations required the permittee to follow the route prescribed by the highway officials and to notify and make proper arrangements with any railroad company for moving over its grade crossings (Pennsylvania's Exhibit GG, 1253a, Pennsylvania's Exhibit HH, 197a, 217a, 229a-230a). At the time of the accident the crane was being operated without the required permit and without any prior notice to the railroad company (189a, 208a, 234a).

Groves' Vice President McKay, who was in charge of the project to which the crane was assigned (184a, 225a, 238a), confessed that he would take a chance and move such a vehicle without getting a permit. If he got caught he would pay the fine, but if not, he would escape paying the permit fee (199a). Groves' Vice President Klock, who was in charge of another Groves' highway project in the area (211a), never permitted his overweight vehicles to move without a permit. Before having them cross railroad

4. Act of May 1, 1929, P. L. 905 §§ 901, 905, 75 P. S. §§ 451, 455.

tracks at grade Klock always communicated with the railroad company, which then set a time when it was safe to move them over the grade crossing selected (218a, 220a, 221a-222a).

Under an established procedure of the railroad company, owners of heavy equipment normally gave notice of intended movements of their equipment over grade crossings, and the railroad furnished complete protection for such movements (765a, 767a-768a). When so notified, the tower operator in charge of rail movements in the area held the equipment at the crossing until a suitable interval between trains permitted its safe passage (771a). He then set the block signals against train movements in either direction and permitted the equipment to cross, under the supervision of a railroad employee (768a-772a). Block tower records showing such protection for heavy equipment were admitted in evidence (850a-851a, 913a, 916a, 917a, 920a).

Several days before the accident the crane in this case had been moved from McKay's project at Eagle, Pennsylvania, to Klock's project at Conshohocken. For that movement a permit was obtained from the Pennsylvania Department of Highways which required the crane to go by way of the Route 23 underpass, so that it would not have to cross the Trenton Cut-off at grade (117a, 189a, 197a, 290a). On that trip the crane passed safely through the underpass, after the operator and his assistant had turned the boom around (197a, 290a). However, in order to save the trouble of turning the boom to go through the underpass (112a, 117a, 121a) on the return trip from Conshohocken to Eagle, the crane operator and his assistant chose to go over the Longs Road grade crossing instead of using the route which had theretofore been prescribed by the Department of Highways (116a, 117a, 197a, 291a). It was admitted that the Groves company gave no notice to the railroad company of the proposed movement of the crane over the Longs Road crossing and made no arrangements with the railroad for doing so (197a-199a, 203a-204a, 292a).

Various witnesses of the Groves Company, including its crane operator and master mechanic, testified that the crane had had motor trouble prior to the accident and had stalled on a number of occasions, including the morning of the accident before the crane had left on its last trip (115a, 188a, 296a, 298a, 329a-330a, 336a). According to the master mechanic, the only possible causes of such stalling were either defective equipment, improper operation, or an inadequate supply of gasoline (335a-336a).

After a long westbound freight, followed by a pusher engine, had passed over the crossing (145a-146a, 303a, 1116a, 1018a), the assistant, who had preceded the crane across the tracks (293a), signaled the crane operator to cross (113a, 294a). The crane operator started the crane across at its lowest speed, after looking to the west, but did not look up again until he had stalled the crane on the crossing and heard the whistle of the eastbound freight (113a, 114a). He estimated that the crane was stalled on the track one and one-half to two minutes before the impact (120a). He failed in his attempt to start the crane, and jumped to safety just before the crash (113a, 114a). In its Answers to Interrogatories, Groves admitted that the crane operator and his assistant saw the oncoming eastbound freight approximately half a mile away from the crossing (204a, 207a) and that just before the crash, the train was moving at a speed of 50 miles per hour (207a), which was the speed authorized by the railroad company in that section (519a, 667a-668a, 937a).

McDonald, the fireman and also an experienced engineman (508a, 509a), who was then operating the engine (502a), blew the customary warning whistle approximately at the eastbound whistle board, which was 1470 feet from the crossing (523a, 1085a). When the train rounded the curve and was within about 800 feet of the crossing, Woodington could see that the boom of the crane was projecting in its path (524a, 545a-546a) and shouted to McDonald to "dump her". Thereupon McDonald promptly applied the brakes in

emergency (524a, 575a). The brakes functioned properly (548a, 577a), but at the speed at which it was traveling the train could not be stopped in time to avoid the collision. The train's speed was variously estimated at from 30 to 50 miles per hour (1011a, 1115a, 1047a). The evidence was uncontradicted that on this track, with a train of this length and weight, an emergency stop at 50 miles per hour could only be accomplished in 4500 feet; and that an emergency stop could not be accomplished within 700 to 800 feet unless the maximum speed were 20 miles per hour (472a, 525a).

In submitting the case to the jury on the question of the railroad company's negligence, the trial judge charged that it should consider whether it was reasonable for the railroad to specify a speed of 50 miles per hour if the train could not be stopped at Longs Road crossing within the visibility of its operator (1172a), to which respondent took appropriate exception (1184a). Petitioner failed to note any objection or exception to the charge or to submit any points for charge on any of the issues of the railroad's negligence.

After verdicts on which judgments were entered against both defendants, petitioner and respondent appealed to the court below. Respondent assigned as error the portion of the charge referred to above (1237a), but petitioner made no argument at all to the court below about the propriety of this portion of the charge.

The court unanimously affirmed the judgment against petitioner, and, one judge dissenting, reversed the judgment against respondent and ordered a new trial on the issue of liability alone, on the ground that the charge was prejudicially erroneous and that justice required a new trial for the railroad company. The court noted that "the negligence of Groves was gross while that of the Pennsylvania was slight and based upon rather limited and debatable evidence" (Petitioner's Appendix A, p. 29).

STATEMENT OF RESPONDENT'S POSITION.

The petition for certiorari should be denied for the following reasons:

Petitioner has no legal standing, either in its own right or as assignee of plaintiff's judgment against itself, to seek a review of the order of the court below reversing plaintiff's judgment against respondent and remanding the case for a new trial. Petitioner seeks a review of questions which it claims are of great importance under the Federal Employers' Liability Act, but it is neither a railroad company nor a railroad employee and therefore is not, nor ever can be, subject to the provisions of that Act. Even if it were a member of the affected class of litigants, it has no legal interest which was affected by the order below and therefore has no standing to seek a review of it.

The order below was entered in the proceeding between the plaintiff and the railroad company, in which petitioner had no adversary interest and made no request for charge, nor any argument in the court below as to its propriety. The only adversary proceeding between petitioner and respondent is petitioner's cross-claim for contribution of 50% of the judgment paid to Woodington, which is still pending in the trial court. Petitioner therefore has no standing in its own right to seek a review of the order of the court below in the suit between Woodington and the railroad company.

Petitioner also obtained no enhanced legal standing by taking an assignment of Woodington's judgment against itself. By paying to Woodington the full amount of the judgment, petitioner extinguished any right in him to prosecute a new trial against the railroad or to appeal from the order which granted it. Any issue between Woodington and the railroad company as to the manner in which his case against the railroad was submitted to the jury has become

moot by his acceptance of payment of his judgment from Groves.

The questions presented do not merit review. The decision below was fully justified by the trial judge's inadequate application of an established legal principle and his faulty analysis of the unique facts in evidence here. The case does not involve any new or important rule of general or special application to suits under the Federal Employers' Liability Act. Moreover, even as to this petitioner, the questions which it seeks to have reviewed may become moot if, in the trial of its pending cross-claim against the railroad company, the jury finds respondent negligent under a charge which meets the requirements of the law.

ARGUMENT.

I. Petitioner Has No Legal Standing, Either in Its Own Right or as Assignee of Plaintiff's Judgment Against It, to Seek Review of the Reversal of Plaintiff's Judgment Against the Railroad Company.

Parties to cases before the Supreme Court must establish their legal standing to invoke the court's jurisdiction. *Tyler v. Judges of the Court of Registration,* 179 U. S. 405 (1900); *Sprunt & Son v. United States,* 281 U. S. 249 (1930); *Boston Tow Boat Co. v. United States,* 321 U. S. 632 (1944). In this case petitioner has filed a petition for a writ of certiorari, "individually and as Assignee of Wallace Woodington", to review the order of the court below reversing the judgment in favor of Woodington against the railroad company. Although Groves was a party defendant in the common law action for negligence brought by Woodington and tried before the same court and jury which heard the statutory action by Woodington against the railroad company under the Federal Employers' Liability Act, the order of which Groves now complains was entered in the action between plaintiff and the railroad company, and in no way affected any legal interest of Groves because Groves was not an adversary party in that proceeding. Petitioner has no legal standing either in its own right or as assignee of plaintiff's judgment against itself to seek a review of this order.

A. Petitioner Has No Legal Standing to Seek Review in Its Own Right.

The only questions that Groves raises in its petition relate to the correctness of the decision of the court below on the trial judge's charge concerning the negligence of the railroad company as to Woodington. The reason urged

upon this court to review this decision is that the court below "has established an important rule of law involving the application of the Federal Employers' Liability Act . . . of great concern to the entire railroad industry and to each employee protected by the Federal Act" (Petition, p. 9).[5] But Groves is neither a railroad company nor a railroad employee. It is a large contracting corporation engaged in road building and heavy construction work (222a). It is not even a member of the class of litigants which might be affected by an interpretation of the Federal Employers' Liability Act, if that were actually involved here, and thus has no legal interest in how that Act may be interpreted or applied. *Tileston v. Ullman*, 318 U. S. 44 (1943); *Heald v. District of Columbia*, 259 U. S. 114, 123 (1922); *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, 149 (1919). What Groves is really seeking is an advisory opinion, not even for itself, but ostensibly for the benefit of the "entire railroad industry and . . . each employee protected by the Act" (Petition, p. 9). Under the decisions of this court, even if it were a member of the affected class of litigants, Groves would still have no standing to petition for such an opinion in the absence of some legal interest personal to it that was affected. *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151 (1914); *Liberty Warehouse Co. v. Burley Tobacco Growers' Co-op. Marketing Ass'n*, 276 U. S. 71, 88 (1928). It has none here.

Groves was not an adversary party in the proceeding of which it seeks review, namely, the action between Woodington and the railroad company. It, of course, would have had legal standing to petition for a review of the judgment in favor of plaintiff against itself, but this it failed to do

5. Actually, the decision below is neither important nor of special application to suits under the Federal Employers' Liability Act. It involved only the application of a recognized rule of railroad negligence law to the unique facts of this suit by a railroad engineman. See respondent's further discussion of this point at pp. 17 to 18, below.

for two obvious reasons: it had not even a remote prospect of success because separate judgments against it in suits arising out of this same accident had been unanimously affirmed by two Courts of Appeals on two separate jury verdicts;[6] and after its motion for a stay of execution on plaintiff's judgment was denied, it chose to pay the judgment and merely take an assignment of it.[7] The questions of which petitioner seeks review arose not in the common law action involving Groves, but in the statutory action of the plaintiff against the railroad company, as to which Groves had no adversary interest. The error of the trial judge in charging the jury as to the railroad company's negligence was committed only against respondent, and respondent alone excepted to the disputed portion of the charge (1184a). Petitioner filed no requests for charge in the trial court on any aspect of the railroad's negligence, and in the court below petitioner made no argument as to the propriety of the charge in respect of the railroad company's negligence. The fact that *respondent* raised this question below does not confer legal standing upon *petitioner* to seek a review of this issue here. Cf. *Sully v. American National Bank*, 178 U. S. 289, 297 (1900).[8] Since petitioner is not an adversary party in the proceeding affected by the order of the court below reversing the judgment against the railroad company, and neither sought nor

6. The Court of Appeals for the Third Circuit held Groves negligent as a matter of law in *McDonald v. Pennsylvania Railroad Company*, 210 F. 2d 524, 528 (3rd Cir. 1954). The court below, in unanimously affirming the judgment against Groves, adopted Chief Judge Biggs' indictment of Groves in the *McDonald* case, saying:

> "In the case at bar a man was killed by reason of a senseless accident caused by the indifference of the employees of a large contracting company, reflected by at least one of its officers, to the laws of Pennsylvania governing highway traffic." (Petitioner's Appendix A, p. 21).

7. Respondent's Appendix B, pp. 32 to 34, below.

8. The *Sully* case held that a party seeking review of a decision of a state court must show that *it* raised the question presented to this court, not that the question was raised by some other party in the court below.

objected to any portion of the charge upon which the court below based its order reversing the judgment, it has no legal standing to obtain a review of that order in this court.

The only adversary proceeding between petitioner and respondent is the cross-claim by Groves against the railroad company for contribution of 50% of any judgment recovered by plaintiff against Groves, which was filed at the outset of this litigation (19a-27a). This cross-claim has not been adjudicated and is still pending in the United States District Court for the Southern District of New York.[9] Groves' only adversary interest with respect to the railroad company is in the assertion of its right of contribution, which arises under Pennsylvania law,[10] *United States v. Yellow Cab Co.*, 340 U. S. 543 (1951), aff'g, *Howey v. Yellow Cab Co.* 181 F. 2d 967, 973 (3rd Cir. 1950). Thus, the only adversary proceeding between petitioner and respondent is still pending and undecided. Petitioner has no legal standing in its own right to seek a review of the order of the court below in the suit between Woodington and the railroad company.

B. Petitioner Has No Legal Standing to Seek Review as Assignee of Plaintiff's Judgment Against Itself.

Apparently recognizing the absence of any legal standing in its own right to file the petition in this case, petitioner has attempted to place itself in the position of the

9. At the close of the evidence in the trial of the instant case, Groves' trial counsel submitted a supplemental motion requesting an instruction that the jury should return a verdict in favor of Groves against the railroad company for one-half the amount of damages that it might find for the plaintiff against Groves (1124a), but this motion was later withdrawn before the case went to the jury (1149a); and the trial court never submitted any issue whatever to the jury affecting the respective rights of contribution between Groves and the railroad company (1152a-1180a).

10. The applicable Pennsylvania statute provides:

"Contribution shall be enforceable among those who are jointly or severally liable for a tort where, as between them, such liabilities are either all primary or all secondary." Act of June 24, 1939, P. L. 1075, § 1, 12 P. S. 2081.

plaintiff by obtaining an assignment from him of his judgment against petitioner itself. After the Court of Appeals reversed the judgment against the railroad company and ordered a new trial, Groves moved for a stay of execution on the judgment which has been affirmed as to it, pending the outcome of plaintiff's new trial against the railroad company. When this motion was denied, Groves paid the plaintiff's judgment against it and took an assignment of it (Respondent's Appendix B, pp. 32 to 34 below). By this act of payment Groves rendered moot any issues between plaintiff and respondent arising from the manner in which his case against respondent was submitted to the jury by the trial court.

Woodington is legally entitled to but one satisfaction of his right to damages for the injuries that he sustained in this accident. Having accepted payment of the entire judgment from the tortfeasor against which his judgment was affirmed, Woodington cannot pursue his new trial against the railroad company [11] or any further appeal raising questions about the propriety of the trial judge's charge on the negligence of the railroad company.[12] Payment to Woodington of the full amount of his judgment extinguishes any further right in him against the railroad; and the case which he began against the railroad is now moot by reason of his acceptance of the benefits of his judgment against Groves. This court will not issue its writ of certiorari to review a question which has become moot because of the subsequent conduct of the party who might otherwise have sought review. *Brownlow v. Schwartz*, 261 U. S. 216

11. *Thompson v. Fox*, 326 Pa. 209, 192 Atl. 107 (1937); *Union of Russian Societies v. Koss*, 348 Pa. 574, 577, 36 A. 2d 433 (1944); *Anstine v. Pennsylvania Railroad Company*, 352 Pa. 547, 43 A. 2d 109 (1945), where a plaintiff recovered judgment against two defendants, one of which appealed and obtained a reduction of it, payment of the reduced judgment was a complete satisfaction as to both defendants and barred recovery by plaintiff of the balance of the original judgment from the defendant which had failed to appeal from it.

12. *Gibson's Appeal*, 108 Pa. 244 (1885); *Hall v. Lacy*, 37 Pa. 366 (1861); *Smith v. Jack*, 2 Watts & Serg. (Pa.) 101 (1841).

(1923); *California v. San Pablo & T. R. R. Co.*, 149 U. S. 308 (1893); *Dakota County v. Glidden*, 113 U. S. 222 (1885).

Since Woodington himself would have no legal standing in this court to raise questions that are now of only academic interest to him, Groves, as his assignee, has not enhanced its own legal standing by taking an assignment of its own judgment that it paid to Woodington.[13] Petitioner accordingly has no legal standing as Woodington's assignee to raise the questions of which it now seeks review.

II. The Questions Sought to Be Raised by the Petition Do Not Merit Review at This Time.

The petition seeks review of the order of the court below reversing the judgment against the railroad company and remanding the case for a new trial. Although this court has authority under 28 U. S. C. § 1254 (1) to review by writ of certiorari non-final judgments of the Courts of Appeals, its decisions clearly indicate that this power is to be exercised only in extraordinary cases;[14] for example, where questions of great public interest or constitutional significance are involved, *United States v. General Motors Corp.*, 323 U. S. 373 (1945); *Land v. Dollar*, 330 U. S. 731 (1947); *Youngstown Co. v. Sawyer*, 343 U. S. 579 (1952); or where a basic jurisdictional question can be resolved which would raise an insuperable objection to the maintenance of the suit, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). This case is not the kind of extraordinary case which would merit review of an order granting a new trial

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13. *Northwestern National Bank v. Commonwealth*, 345 Pa. 192, 201, 27 A. 2d 20, 25 (1942); *Peoples Pittsburgh Trust Co. v. Commonwealth*, 359 Pa. 622, 60 A. 2d 53 (1948).

14. The court's attitude was succinctly expressed in *American Construction Co. v. Jacksonville Railway*, 148 U. S. 372, 384 (1893):

> ". . . Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

to one of two defendants, even though petitioner had the legal standing to request it.

Far from "establish[ing] an important rule of law involving the application of the Federal Employers' Liability Act" . . . "of serious concern to all in the railroad field," as petitioner suggests (Petition, pp. 9, 15), the decision of the court below involved only the application of an established rule of railroad negligence law to the unique facts of this case and the trial court's inadequate explanation of the law's application to the evidence. See *Plough v. Baltimore & O. R. Co.*, 172 F. 2d 396 (2d Cir. 1949), cert. den. 337 U. S. 940 (1949).

The proposition that a railroad company is not obligated to operate its trains over grade crossings in the open country at a speed which will permit them to be stopped within the range of the operator's vision is well recognized. *Guyler v. Lehigh Valley R. Co.*, 165 Pa. Super. 196, 67 A. 2d 575 (1949); *Custer v. B. & O. R. Co.*, 19 Pa. Super. 365, 369 (1902), aff'd, 206 Pa. 529, 55 Atl. 1130 (1903); *Veres v. Pennsylvania R. Co.*, 161 Pa. Super. 177, 54 A. 2d 77 (1947); *Homeland Ins. Co. v. Thompson*, 12 So. 2d 62 (La. App. 1943); *Seaboard Airline R. Co. v. Crowder*, 191 Va. 635, 62 S. E. 2d 227 (1950); *Cameron v. Northern Pacific R. R. Co.*, 234 Minn. 397, 48 N. W. 2d 540 (1951); *Modlin v. Consumers Cooperative Assn.*, 172 Kan. 420, 241 P. 2d 92 (1952).

The court below applied this established principle to the particular facts of this case and found the trial court's charge to the jury inadequate and misleading in its analysis of the evidence. As Chief Judge Clark pointed out, among other things, the trial judge's emphasis upon the speed of the train and its inability to stop within the range of the operator's vision virtually excluded from the jury's consideration the important facts of the Pennsylvania law with respect to the duty of overweight vehicles to make special arrangements for crossing railroad tracks at grade and the Pennsylvania Railroad's established escort pro-

cedure for the protection of such vehicles at this very crossing (Petitioner's Appendix A, pp. 26-27), both of which would have rendered the speed of the train, its inability to stop, and the absence of warning signals [15] completely irrelevant to a finding of respondent's negligence.

The decision of the court below in no way "restricted the fact-finding powers of juries," as petitioner contends (Petition, p. 15); it simply assured that in this particular case the jury's fact finding would be done with the benefit of instructions which clearly and fairly presented the issues for determination. Manifestly, a decision which turns upon the inadequacy of a trial judge's application of an established legal principle and his faulty analysis of the unique combination of circumstances that were involved here does not merit review upon certiorari.

Moreover, even as to this petitioner, the question which it seeks to have reviewed now may become moot. Its claim for contribution against the railroad company is still undecided. Whether it attempts to enforce that claim through the unadjudicated cross-claim now lying in the United States District Court for the Southern District of New York or in a new action against the railroad company, the issue of the railroad's negligence must yet be tried in an adversary proceeding between petitioner and respondent. If the jury in that proceeding finds the railroad company negligent under a proper charge, the question which petitioner now seeks to have reviewed need never be decided by this court; and if it finds the railroad company free of negligence, the propriety of the payment of plaintiff's judgment by Groves alone will be confirmed.

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15. Not to mention the fact that the warning signs which were installed fully complied with the order of the Pennsylvania Public Utility Commission, the agency with exclusive power to prescribe protective devices at grade crossings in Pennsylvania. Act of May 28, 1937 P. L. 1053, art. IV, § 409(b), 66 P. S. § 1179(b).

III. Conclusion.

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

PHILIP PRICE,
ROBERT M. LANDIS,
Counsel for Respondent.

DAVID J. MOUNTAN, JR.,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
Of Counsel.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 10,996, 11,021.

ELLA M. McDONALD, EXECUTRIX OF THE ESTATE OF JASPER R. McDONALD, SR., DECEASED,
Appellant in No. 10,996,

v.

THE PENNSYLVANIA RAILROAD COMPANY

and

S. J. GROVES & SONS CO., INC.
Appellant in No. 11,021.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 5, 1953

Before BIGGS, *Chief Judge*, and McLAUGHLIN and STALEY, *Circuit Judges.*

Opinion of the Court

(Filed March 4, 1954)

By BIGGS, *Chief Judge.*

McDonald, an engineman [1] employed by the Pennsylvania Railroad Company, was killed in a collision at a grade

1. McDonald was classified as a fireman but was employed as an engineer on this occasion, i.e., was actually driving the engine at the time of the collision.

crossing near King of Prussia, Pennsylvania, on or about May 19, 1950. The locomotive he was driving collided with the projecting boom of a very large self-propelled truck crane, owned by S. J. Groves and Sons Company, Inc., a Minnesota corporation, the truck crane having stalled while crossing the railroad's tracks. There was some evidence that the crane had stalled on previous occasions but the reasons given for the failures of power were conflicting.

The plaintiff, McDonald's widow and his executrix, sued both the railroad and Groves. The suit against the railroad was brought under the Employers Liability Act, 45 USCA § 51 *et seq.*, and the Safety Appliance Acts, 45 USCA § 1 *et seq.* The suit against Groves was filed under the Pennsylvania Wrongful Death Act of April 15, 1851, P. L. 669, as amended, 12 P. S. Pa. § 1601, and the Pennsylvania Survival Act of July 2, 1937, P. L. 2755, as amended, see 20 P. S. Pa. § § 320.601 and 320.603. See also Pennsylvania Rules of Civil Procedure, Rule 2201 *et seq.* There was also a cross-claim filed by the railroad against Groves for indemnity or contribution. The jury returned a verdict in favor of the plaintiff against Groves in the amount of $75,000 and in favor of the Pennsylvania Railroad. No order respecting the cross-claim has been made by the court below.

Two appeals were taken.[2] Groves has appealed from the refusal of the trial court to grant judgment n.o.v. or,

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2. A cross-claim was filed by the Pennsylvania Railroad Company against Groves, asserting that it, the railroad, might be held liable to McDonald, the original plaintiff, for all of the loss or damage sustained by her, and that Groves, as the party primarily liable for such loss or damage, was liable over to the railroad company for indemnity. The cross-claim also asserts that the railroad company will be obliged to expend money for expenses and counsel fees in defense of the suit as the result of Groves' negligence. A second cause of action set out in the cross-claim asserts that if it is adjudged that the injuries sustained by the plaintiff's decedent were caused by the joint or concurring negligence of Groves and the railroad, Groves

in the alternative, a new trial in its favor. The plaintiff has appealed from a denial of her motion for judgment

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must bear its equal share of any sums recovered by the plaintiff. No order has been made by the court below disposing of this cross-claim.

Set out below is a schedule of the pertinent incidents in the suit:

December 3, 1951—Verdicts of jury in favor of plaintiff against Groves and in favor of the railroad.

December 3, 1951—Judgments entered on verdicts.

December 7, 1951—Motion by Groves for judgment n.o.v. or in the alternative for a new trial.

December 10, 1951—Motion by plaintiff for judgment n.o.v. against railroad or in the alternative for a new trial.

November 6, 1952—Order of the court below denying Groves' motion for judgment n.o.v. or in the alternative for a new trial.

November 26, 1952—Appeal by Groves to this court.

January 13, 1953—Order by the court below denying plaintiff's motion for judgment n.o.v. against the railroad or in the alternative for a new trial.

January 21, 1953—Appeal by plaintiff to this court.

January 28, 1953—Order by the court below purporting to deny both Groves' motion for judgment n.o.v. or in the alternative for a new trial, and the motion of the plaintiff for judgment n.o.v. or in the alternative for a new trial, the court expressly determining that in the interest of justice there was no just reason for delay in the entry of judgment herein and ordering that judgment be entered. Reference is made in the order to the fact that no disposition has been made of the cross-claim. For the reasons set out hereinafter this order was invalid.

February 18, 1953—Upon the stipulation of all the parties Groves' appeal was dismissed by this court, without prejudice.

February 20, 1953—Order made by the court below entering final judgment in favor of plaintiff and against Groves in the sum of $75,000. The order contains a recital that there are claims which have not yet been adjudicated and is in conformity with Rule 54(b), FRCP. The order does not adjudicate or purport to adjudicate the plaintiff's claim against the railroad. Also, this order expressly vacates the order of January 28, 1953.

February 26, 1953—Appeal by Groves to this court.

There is no valid subsisting appeal by plaintiff against the railroad. The appeal taken on January 21, 1953 by plaintiff against the railroad was from the denial of the court below on January 13, 1953 of plaintiff's motion for judgment n.o.v. against the railroad or in the alternative for a new trial. But the railroad's cross-claim had not been disposed of at the time plaintiff appealed. We cannot treat the order of January 28, 1953 purporting to deny both Groves' motion for

n.o.v. against the railroad or in the alternative for a new trial. There were therefore, the cross-claim aside, three separate causes of action before the court below. The first was brought pursuant to provisions of federal law against the railroad and the latter two were instituted against Groves under provisions of laws of Pennsylvania. The first cause of action referred to is governed by federal law. The two latter claims are governed by the law of Pennsylvania because they are based on diversity of citizenship and jurisdictional amount. We will deal with the claims asserted by the plaintiff against Groves first.

Groves has posed five questions on its appeal. Three of the five relate to the charge to the jury; two, to the admission of evidence. We will deal with the latter first.

Section 903 of the Pennsylvania Vehicle Code of May 1, 1929, P. L. 905, as amended, 75 P. S. Pa. § 453, prohibits the movement of any motor vehicle exceeding certain specified weights on Pennsylvania highways. An exception is made, however, if a special permit for a particular movement of the vehicle be obtained from the Department of Highways. The law requires that the permit ". . . shall designate the route to be traversed, subject to such rules, regulations, restrictions or conditions, as shall be deemed

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judgment n.o.v. or in the alternative for a new trial and the similar motion of the plaintiff as compliance with Section 1291 of the Judicial Code and Rule 54(b) because, appeals having been taken to this court, the court below was without jurisdiction to enter a valid order in the premises. This was undoubtedly the reason why on February 18, 1953 the parties stipulated for the dismissal of Groves' appeal. The dismissal of that appeal by this court renewed the jurisdiction of the court below to enter the order of February 20, 1953 which was a valid one but only insofar as Groves' appeal was concerned.

It may be argued, of course, that since the jury had found the railroad to be free of negligence and assessed damage solely against Groves, the failure to dispose of the cross-claim by an appropriate decree is a mere technicality and a similar argument may be made in respect to the invalidity of the order of January 28, 1953. But if justice is to be adequately administered, orderly procedure is required. This court is without jurisdiction to adjudicate less than all of the claims of a multiple claims suit unless the provisions of Rule 54(b) be adhered to.

necessary by the authority granting such permit . . ." See Vehicle Code, Section 905, 75 P. S. Pa. § 455. It is conceded by Groves that the truck crane exceeded the maximum weight specified for such a vehicle, that a permit was required for the movement and that Groves did not obtain a permit. Since no permit was obtained it is obvious that Groves did not follow a route prescribed by the Department of Highways. The accident occurred because Groves' employees elected to cross the railroad's tracks at a grade crossing instead of making use of a closely adjacent highroad with an underpass. Had Groves' employees made use of the road with the underpass they would have been put to the comparatively slight trouble of reversing the boom on the crane. They preferred not to inconvenience themselves even to this small extent. After the truck crane stalled on the railroad tracks the engine driven by McDonald, dragging a long train of cars, struck the truck crane causing McDonald's death. There was ample evidence from which the jury could have found that McDonald was operating the engine with due care under the circumstances.

At this point the plaintiff need not have proceeded further to prove Groves' culpable negligence. The rejection of a safe overpass or underpass and the election to cross tracks at grade has been held to constitute negligence as a matter of law. See Starovetsky v. Pennsylvania Railroad Co., 328 Pa. 583, 195 A. 871 (1938); Tharp v. Pennsylvania Railroad Co., 332 Pa. 233, 2 A. 2d 695 (1938); and Simpkins v. Pennsylvania Railroad Co., 334 Pa. 1, 5 A. 2d 103 (1939). But the plaintiff offered further proof. She endeavored to prove that failure to obtain a permit under the circumstances at bar was negligence and contributed to the accident. Groves asserts that proof of issuance or non-issuance of a permit was immaterial and that the court erred in admitting proof of the non-issuance of a permit as evidence of negligence or of causation. This requires brief discussion.

The Vehicle Code does not state expressly why an overweight vehicle is prohibited from movement on a Pennsylvania highway without a permit. There are, however, two obvious reasons. The first is that an overweight vehicle may work serious damage to a road and the statute authorizes the Department of Highways to control the movement of heavy equipment to keep damage to a minimum. The second is that overweight vehicles are an obstacle to the free movement of traffic, thereby creating traffic hazards. The Pennsylvania permit system is reasonably designed to keep large equipment off busy highways, narrow streets or grade crossings. Section 905(a) provides that the original copy of the permit shall be carried in the overweight vehicle and shall be open to inspection by any police officer or employee of the Department of Highways and ". . . to any person having collision with or suffering injury from such vehicle." 75 P. S. Pa. § 455. The purpose of the statutory enactment is plain; viz., to control by a state agency the movement of large vehicles on highways in the interest of the public safety. The statute enacted was well within this police power of the Commonwealth.[3]

"General Conditions", really regulations in the sense that that phrase is used in the federal system, were imposed by the Department of Highways pursuant to the statute. Paragraph 2 of the Conditions provides that nothing in the permit shall be construed to confer authority to cross any "railroad or railway tracks, at grade, *until after due and sufficient notice of such proposed crossing shall have been given* . . . to the track supervisor or to the authorized agent of the railroad . . . *and proper arrangements made for such crossing* . . ." (Emphasis added.)

There is evidence in the record from which the jury was entitled to infer that had Groves applied for a permit

3. The title of the Vehicle Code states its primary object: ". . . *for the protection of the public safety;* regulating the use of highways, and the operation of vehicles . . . upon the highways of this Commonwealth . . .". (Emphasis added.)

to move the truck crane that permit would not have embraced the grade crossing which was actually employed. Conversely, the jury would have been entitled to infer that had a permit been obtained the route specified would have required use of the underpass. It is also clear that had Groves given notice to the railroad of the proposed crossing at grade McDonald could have been informed in ample time to have avoided the collision. The evidence of Groves' negligence was sufficient to go to the jury which obviously resolved it in the plaintiff's favor. The case at bar does not present circumstances analogous to those presented by decisions where the lack of a driver's license has been held not to constitute proof of negligence. Cf. Yeager v. Winton M. C. Co., 53 Pa. Super. 202 (1913).

Groves asserts that the permit form and the regulations [4] were not properly admitted into evidence because it was not proved that the Secretary of the Commonwealth had adopted regulations or General Conditions pursuant to the statute. Too great a time at the trial was consumed by the plaintiff's attempts to prove the adoption of the Conditions.[5] Groves objected to the admission of copies of the permit form with the General Conditions printed upon its back though accompanied by a certificate of the Deputy Secretary of Highways and issued under the seal of the Department of Highways. Groves insists that Section 1 of the Act of May 2, 1929, P. L. 1508, 71 P. S. Pa. § 1379, which provides that the Secretary of Highways is authorized to adopt and procure an official seal and that "[C]opies of all *records, books, papers, documents* and *rulings* of the Department of Highways, when certified by the Secretary of Highways under the seal of the Department shall be received in evidence in the courts of this Com-

4. Plaintiff's Exhibits P-9 and P-10.

5. As we have had occasion to point out in other opinions such issues can be handled at pretrial without loss of the time of a jury, of the court and of counsel. We again suggest that the customary pretrial procedure be employede in cases such as the one at bar.

monwealth . . ." with the force and efficacy of originals, did not authorize the admission of these exhibits in evidence. (Emphasis added.) Groves argues that it is not clear from this section what constitutes a proper certification and that copies of the permit with the regulations printed thereon are not within the terms "records, books, papers, documents and rulings." This is a mere play on words. The language of the certificate of the Deputy Secretary of Highways, set out below [6] matches that of the statute sufficiently closely to comply with its terms. Groves also asserts that the certificate is insufficient for a variety of other reasons. We do not think these merit discussion.[7] The certificate was sufficient and adequate proof was made of the copies and of the General Conditions. The Penn-

6. His certificate stated:

"I HEREBY CERTIFY that Section 905 of the Act of May 1, 1929, P. L. 905, as amended, authorizes the Secretary of Highways of the Commonwealth of Pennsylvania to issue a Special Hauling Permit authorizing the movement of motor vehicles and their loads over the highways under his jurisdiction; and to prescribe the rules, regulations, restrictions and conditions under which said permit shall be used; that acting under the authority granted by said Act, the Secretary of Highways prescribed the rules, regulations and conditions to be attached to said permits and has embodied the same in Department of Highways' Form No. 936-P, a copy of said form being hereto attached.

"IT IS FURTHER CERTIFIED that the exact date of the promulgation of said rules and regulations cannot be accurately determined. However, the form hereto attached has been in use for many years and is still the form of permit used by the Department of Highways in the issuance of special permits for the moving of motor vehicles and loads over Pennsylvania's State highways.

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this department the day and year aforesaid."

7. Typical among these is the assertion that the certificate is void because it does not give the date of the adoption of the regulations by the Department of Highways. Groves also insists that there is a difference between the printed copy of regulations and regulations "embodied" in an official form. Groves would require of the Department of Highways of Pennsylvania the counsel of perfection.

sylvania statute read in conjunction with Rule 44, FRCP, will demonstrate that the court below committed no error on this issue.

Before coming to any question presented by the charge of the court we think it necessary to refer briefly to another matter. Groves insists that the atmosphere of the trial was unfavorable to it; that "many improper remarks were made against Groves, all of which certainly inflamed the jury to Groves' prejudice, and an exoneration of the railroad was the effect." We have carefully examined the record and we find this charge to be without substance. The case was indeed sharply contested. But the record shows that the trial judge held the scales of justice exactly in balance insofar as his attitude toward the respective sides was concerned. We are of the opinion that the numerous technical objections by Groves to the admission of the copies of the form of special permit and the "General Conditions" could have had some effect upon the jury but this is not demonstrable from the record. The attitude of Groves' vice-president was such, however, as could have aroused reasonable irritation, if not a stronger feeling, in the minds of the jury. An example of this will suffice. He was asked in effect why a permit had not been obtained for the movement of the truck crane and he replied: "Most of the time, when we move equipment of that kind, we get permits. We don't all the time. It is a matter of a man overloading his truck. Sometimes you take a chance and get caught and you pay the fine, and if you don't get caught you don't have to pay the permit fee." In the case at bar a man was killed by reason of a senseless accident caused by the indifference of the employees of a large contracting company, reflected by at least one of its officers, to the laws of Pennsylvania governing highway traffic. If prejudice developed at the trial insofar as Groves was concerned that prejudice was self-generated. We can find nothing in the record on this point which would justify a reversal.

Coming now to Groves' objections to the charge. Groves asserts that it was error to charge that it would be liable to criminal penalties for violation of the laws and regulations pertaining to the operation of an overweight motor vehicle when in fact no such penalty was provided for in the statute or in the regulations. Groves refers to and emphasizes a decision of the Superior Court of Pennsylvania in *Commonwealth v. Hallberg*, 168 Pa. Super. 596, 81 A. 2d 270 (1951) to the effect that the penalty clause of Section 905 of the Vehicle Code was abrogated by the failure of the Legislature to reinstate it in the amendatory Act of 1937. See 75 P. S. Pa. § 455. But after Groves filed its brief in this court, the Supreme Court of Pennsylvania reversed the decision of the Superior Court of Pennsylvania in the *Hallberg* case. See *Commonwealth v. Hallberg*, 374 Pa. 554, 97 A. 2d 849 (1953). It follows therefore that the reference in the charge of the court below to the criminal penalties to which Groves might be subjected was an accurate one. It could be argued that possible criminal sanctions could have nothing to do with Groves' liability for negligent operation of the truck crane, but assuming *arguendo* that this is so, we are of the opinion nonetheless that the error would not be of such a fundamental character as to require reversal by this court particularly in view of the fact that no exception was taken to the charge upon this point.

There are other objections asserted to the charge by Groves. Groves asserts that the instruction to the jury to assess the damages in the death action by a widow administratrix on the basis of multiplying yearly earnings of the dead man by his life expectancy was erroneous. At one point in its charge, the court used the word "earnings" instead of demonstrating to the jury that the issue was as to the amount of *contributions* made by the deceased to his widow. But no exception was taken to the charge on this ground.

Groves also asserts that the charge did not adequately require the jury to reduce future damages to present worth; that that portion of the charge dealing with the interest rate was erroneous; that the court did not sufficiently discuss either the proper use of mortality tables by the jury or the respective measure of damages as between death and survival actions. The short answer to all this is that again no exception was taken to the charge. Moreover, an examination of the extended colloquy between court and counsel for the respective parties, demonstrates that Groves agreed to the charge of the court upon the measure of damages as to death and survival actions under the law of Pennsylvania.

We cannot deem the errors in the charge to be so fundamental as to require reversal, absent exception by Groves' counsel. Groves may not be permitted to take the position that it will not object to the substance of a charge and after a verdict has been rendered against it overturn that judgment on such grounds as those presented here. See Rule 51, FRCP, and Kieffer v. Blue Seal Chemical Co., 196 F. 2d 614, 616 (3 Cir. 1952).

We are without jurisdiction to adjudicate the plaintiff's appeal against the railroad. See note 2, *supra*.

Other points raised by the parties do not require discussion.

The judgment in favor of the plaintiff and against Groves will be affirmed. The appeal of the plaintiff will be dismissed.

APPENDIX B.

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 63-130.

WALLACE WOODINGTON,

Plaintiff,

against

THE PENNSYLVANIA RAILROAD COMPANY AND S. J. GROVES & SONS CO., INC.,

Defendants.

Assignment of Judgment.

KNOW ALL MEN BY THESE PRESENTS that I, Wallace Woodington, of 21 West Park Avenue, Clementon, RFD, New Jersey, in consideration of the sum of Three Hundred Twenty Thousand Five Hundred Ninety-Two and 57/100 Dollars ($320,592.57) to me in hand paid by and for the account of S. J. Groves & Sons Co., Inc., receipt whereof is hereby acknowledged, do hereby grant, bargain, transfer, assign and make over unto the said S. J. Groves & Sons Co., Inc., its successors and assigns, a certain judgment by me recovered in the United States District Court for the Southern District of New York against The Pennsylvania Railroad Company and S. J. Groves Sons & Co., Inc., dated May 9, 1955, for the sum of Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500) debt or damages, and the sum of One Hundred Sixty-Four and 00/100 Dollars ($164.00) costs of suit, and the sum of Twenty-

Two Thousand Nine Hundred Twenty-Seven and 82/100 Dollars ($22,927.82) representing interest on said judgment to October 3, 1956, which said judgment was affirmed by the United States Court of Appeals for the Second Circuit with respect to S. J. Groves & Sons. Co., Inc., but reversed and remanded for a new trial as to the question of liability only as to defendant The Pennsylvania Railroad Company, together with all the benefit and advantages that may be obtained thereby. And I do hereby grant to it, the said S. J. Groves & Sons Co. Inc., its successors and assigns, full power to recover the same to its and their own use.

In Witness Whereof I have hereunto set my hand and seal this 3rd day of October, 1956.

/s/ Wallace Woodington.

Signed, sealed and delivered
in the presence of:

/s/ B. N. Richter,
/s/ Leo Gitlin.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

On the 3rd day of October, 1956, before me personally came Wallace Woodington, to me known, and known to me to be the individual described in, and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

/s/ MARIAN H. CARACENA,
Marian H. Caracena,
Notary Public, State of New York,
Qualified in Queens County,
No. 41-5604950,
Commission Expires March 30, 1958.

(SEAL)

JAN 10 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 592

S. J. GROVES & SONS CO., INC., a Minnesota Corporation, Eagle, Pennsylvania, individually and as Assignee of Wallace Woodington,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JOSEPH LORENZ,
Counsel for Petitioner.

C. J. PERNICONE,
C. P. LAMBOS,
Of Counsel.

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Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The brief in opposition to the Petition for Certiorari questions petitioner's legal standing to seek review of the judgment below. This short reply will demonstrate that petitioner's right is not subject to challenge.

A. Petitioner Has Standing as a Party Below.

Petitioner was one of two parties defendant against whom Woodington, the injured locomotive engineman brought suit in the District Court (3a-4a). From a judgment against each of the tortfeasors, both defendants appealed to the Court of Appeals for the Second Circuit. The judgment against Petitioner was affirmed; the judgment against Respondent was reversed and a new trial ordered (Appendix A to Petition, p. 29). 28 U.S.C. § 1254 (1) gives this Court jurisdiction to review cases in the

courts of appeals upon the petition "of any party" to a civil case. Petitioner's standing as a party below is obvious.

B. Petitioner Has Standing to Seek Review of a Judgment Granting a Joint Tortfeasor a New Trial Which Adversely Affects Its Right of Contribution.

Respondent argues that Petitioner has no legal interest in the questions presented for review because it is neither a railroad nor a railroad employee subject to the provisions of the Federal Employer's Liability Act, 35 Stat. 65, as amended by 53 Stat. 1404, 45 U.S.C. § 51, *et seq.* The cases cited, on page 12 of Respondent's brief,* in support of this argument concern only the capacity of persons to bring suit attacking the constitutionality of statutes and not the right of persons who were proper parties below to seek review of a determination reversing a judgment against a joint tortfeasor. The law of Pennsylvania, the locus of the accident, which determines petitioner's liability, leaves no question of petitioner's right to seek review of the judgment below. The Supreme Court of Pennsylvania has upheld the right of one joint tortfeasor to appeal on the sole ground that a new trial should not have been granted to his co-defendants. *Frank* v. *W. S. Losier & Co. Inc.*, 361 Pa. 272, 64 A. 2d 289; *Schwartz* v. *Jaffee*, 324 Pa. 324, 331, 188 Atl. 295; *Ashworth* v. *Hannum*, 347 Pa. 393, 396, 32 A. 2d 407; *Hair* v. *Ference*, 352 Pa. 164, 167, 42 A. 2d 535; accord, *Muggenburg* v. *Leighton*, 240 Minn. 21, 60 N. W. 2d 9. In the *Frank* case, *supra*, a verdict against three joint tortfeasors was set aside by the court as to two of them and a new trial

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* *Tileston* v. *Ullman*, 318 U. S. 44; *Heald* v. *District of Columbia*, 259 U. S. 114; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U. S. 134 (1919).

ordered in their favor. On appeal, on the sole ground that new trials should not have been ordered, the Supreme Court of Pennsylvania upheld the right to review, saying, 361 Pa. at page 275:

> "That he has the right to make such an appeal is undoubted—in order, if he succeeds therein to make the other defendants share his liability to plaintiff * * *."

Respondent admits that petitioner has a right of contribution against it (Respondent's Brief, p. 14). Petitioner was seriously affected by the judgment of the Court of Appeals. Its right to look to respondent for payment of one-half the judgment against it, established by the verdict of the jury, and the judgment of the trial court, was taken from it by a ruling of the Court of Appeals. This ruling established an important rule of law in the field of railroad employees' rights which merits review by this Court.

Respondent also argues (Respondent's Brief, p. 13) that Petitioner may not seek review of the Court of Appeals' judgment because it made no requests to charge in the trial court on any aspect of respondent's negligence. The simple answer to this is that petitioner was and is satisfied with the charge of the trial court. The further statement that petitioner did not argue in favor of that portion of the charge in the court below is contradicted by pages 30-31 of its brief to the Court of Appeals.

Petitioner's legal standing, in its own right, to seek review of the judgment below is so manifest that respondent's arguments addressed to the effect of the assignment of Woodington's judgment are immaterial. The right of contribution of petitioner against respondent may be enforced under Pennsylvania practice either in an independent action or by having the judgment marked to the use of petitioner and taking an assignment thereof. *Puller*

v. *Puller*, 380 Pa 219, 220-221, 110 A. 2d 175. If the Court of Appeals should be held in error, petitioner will obtain his contribution from respondent without need for further litigation. The fact of payment by petitioner, after denial of its motion for a stay of execution neither renders the case moot nor affects petitioner's standing in this Court. See *Dakota County* v. *Glidden*, 113 U. S. 222, 224; *Bakery Sales Drivers Local* v. *Wagshal*, 333 U. S. 437, 442; *Cahill* v. *New York N. H. & H. R. Co.*, 351 U. S. 183.

C. The Important Rule of Law Established by the Court Below Requires Review.

There remains unresolved the question of petitioner's right against respondent, which had been fixed by the trial court's judgment. That right was detrimentally affected by the Court of Appeals' establishment of a rule of law which would exonerate a railroad company from liability, in all similar cases, for the operation of its trains at such rates of speed as would make the effective stopping thereof impossible within the operator's range of vision when about to pass over a known extra-hazardous grade crossing.**

This rule of law is, as the Court of Appeals said of "importance in modern railroading" (Appendix A to Petition, p. 27). It confines, within inexorable limits, the definition under these facts of a safe place to work; and it restricts a jury's right to consider all relevant facts and draw reasonable inferences therefrom, in assessing fault.

** The cases cited by respondent, on page 17 of its brief, involve grade crossings in the open country not known to be extra hazardous.

CONCLUSION

For the reasons stated herein, and in the petition, Petitioner respectfully requests the Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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